148 U.S. 19

RECORD, CASE No. 15,132.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1162.

THE STATE OF INDIANA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 14, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1892.

1 Court of Claims.

STATE OF INDIANA
vs.
THE UNITED STATES. } No. 16677.

To the honorable the judges of the Court of Claims:

The petition of the State of Indiana respectfully shows as follows:

On April 19, 1816, Congress enacted a statute entitled "An act to enable the people of the Indiana Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States;" that in clause 3 of section 6 of said act is the following provision: "That five per cent. of the net proceeds of the lands lying within the said Territory, and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the said State, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State under the direction of Congress."

3 S. L., 289.

II.

On June 29, 1816, your petitioner, by an ordinance of convention, adopted the several propositions, the one above quoted in full being among the number, and has faithfully kept and performed the same; and by joint resolution, approved December 11, 1816, the State of Indiana was "declared to be one of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatever."

3 S. L., 399.

2 III.

And your petitioner alleges and charges that in view of this legislation on the part of Congress and the passage of the said ordinance of convention of your petitioner — constituted a contract whereby, upon consideration of the great benefit to be derived by the defendant from the enhanced value of her lands and the inducements given to purchasers by their exemption from taxation for a term of five years, the defendant agreed to pay to your petitioner "three per cent." of the "five per cent." of the net proceeds of sale and to expend the remaining two per cent. thereof in "making of a road or roads leading to the said State under the direction of Congress."

And your petitioner further alleges and charges that notwithstanding, upon corresponding conditions, a similar reservation of two per cent. out of the five per cent. fund going to the States of Ohio, Illinois, and Missouri was made, and the defendant undertook and

began the construction of the Cumberland (or National) road, which was to have run from Cumberland, in Maryland, through the capitals of the respective States to Jefferson City, State of Missouri, connecting them with the navigable streams emptying into the Atlantic ocean, nevertheless said road was never built, and in the year 1836 was, by legislative declaration, entirely abandoned and the portion thereof which had been constructed in the States of Maryland, Pennsylvania, and Virginia were ceded to them respectively, and that neither this nor any other road was ever constructed in accordance with the obligations of the contract of the defendant.

And your petitioner further alleges and charges that in consideration of this failure on the part of the defendant other legislation was had by Congress for the purpose of making good to your petitioner the defendant's default herein, returning that part of the consideration reserved by the defendant, which induced the plaintiff to enter into the compact of 1816.

IV.

Congress, on March 2, 1855, passed "An act to settle certain accounts between the United States and the State of Alabama," requiring the Commissioner of the General Land Office to state an account between the Government and that State for the unpaid five per cent. fund (including Indian reservations) which had been reserved
3 to the State of Alabama in her act of admission, clause 3 of section VI of the act of March 2, 1819 (S. L. 3, p. 489), in the same terms as the said five per cent. was reserved to the plaintiff therein in clause 3 of section VI of the act of April 19, 1816 (S. L. 3, p. 289), admitting plaintiff into the Union.

And thereafter, to wit, on March 3, 1857 (S. L. 11, p. 200), Congress passed "An act to settle certain accounts between the United States and the State of Mississippi and other States, whereby in the first section the Commissioner of the General Land Office is required to state an account for the unsettled portion of the five per cent. fund and to include therein the Indian reservations in said State, estimating the same at $1.25 per acre, the second section of which act is as follows:

SEC. 2. "And it be further enacted that the said Commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

V.

Your petitioner alleges that a good and valuable consideration having passed to the defendant for this five per cent. fund, and the same being in the hands of the defendant, payable out of the net proceeds of sales of defendant's public lands within petitioner's territory, and defendant having entire and absolute control and management, through its own officers and agents, of the sales of the said lands and of the accounts of the expenses incurred in making the

same, and the duty being by the act of March 3, 1857, expressly devolved upon one of such officers of defendant to state an account in relation thereto, the said fund became and is impressed with a trust to ascertain the amount from the sales of the public lands and the expense of making said sales, and to pay over to your petitioner five per cent. of the net proceeds thereof, and the right of your petitioner thereto grows out of and is fixed by an act of Congress.

VI.

That from the best information your petitioner can obtain there is now due to your petitioner the sum of four hundred and
4 twelve thousand one hundred and eighty-four and ninety-seven one-hundredths dollars on account of the unpaid portion of the net proceeds of the five per cent. fund, three per cent. thereof having been paid from time to time under the provisions of "An act to provide for paying to the State of Indiana three per cent. of the net proceeds arising from the sales of the United States lands within the same." 3 S. L., 424.

VII.

That the Commissioner of the General Land Office, instead of stating the account as it was and is his plain duty under the specific terms of the statute, has heretofore allowed three per cent. to the State and alleged that he had a right to withhold the remainder for and on account of outlays made of the National road, and your petitioner, through her governor, on the 17th of October inst., made a formal demand in writing upon the Commissioner of the General Land Office to state the account as required by law to do, but instead of so doing he persists in claiming that the two per cent. of the five per cent. fund shall be credited on account of the costs of the National road.

VIII.

That no part of this claim has been paid except as herein specified; that no assignment or transfer of said claim or any part thereof or interest therein has been made.

Wherefore your petitioner prays judgment for the sum of four hundred and twelve thousand one hundred and eighty-four and ninety-seven one-hundredths dollars.

EARLE & PUGH,
Att'ys for the State.

5 STATE OF INDIANA, } *ss:*
City of Indianapolis, }

Before me personally appeared A. P. Hovey, who is to me well known and who is the governor of the State of Indiana, and who, being duly sworn, deposes and says that the matters and things set out in the foregoing petition as of his own knowledge are true, and

that all such as are stated upon information and belief he believes to be true.

ALVIN P. HOVEY.

Sworn to and subscribed before me this 16th day of October, A. D. 1889.

[Notary Public Seal.]

M. H. PEACOCK,
Notary Public.

(Indorsed: Filed Oct. 23, 1889.)

6 In the Court of Claims of the United States, December Term, A. D. 1888.

STATE OF INDIANA
vs.
THE UNITED STATES. } No. 16677.

And now comes the Attorney General on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney General.

(Indorsed: Filed Oct. 25, 1889.)

7 Court of Claims.

STATE OF INDIANA
v.
THE UNITED STATES. } No. 16677.

Ordered that the findings and opinion filed in this case on November 9, 1891, be withdrawn, and that the corrected copy now filed stand as the findings and opinion of the court and be so certified to the Supreme Court.

(Indorsed: Filed June 30, 1892)

8 Court of Claims.

THE STATE OF INDIANA
v.
THE UNITED STATES. } No. 16677.

Decided November 9, 1891.

Finding of Facts.

The court on the evidence finds the following facts:

I.

After the admission of the State of Indiana to the Union the Cumberland or National road was completed from Cumberland to Wheeling; and under the provisions of the acts of May 15, 1820, and March 3, 1825, there was laid out and located a continuance of the road from the right bank of the Ohio river opposite Wheeling, through the States of Ohio, Indiana, Illinois, to the seat of government in the State of Missouri. It was graded, bridged, and made a highway from the Ohio river opposite Wheeling, Va., to its western terminus, and upon it was transported the Government mail, and it was opened to and used by the public; but this was not accomplished until after toll gates had been erected and tolls imposed by the States of Ohio and Virginia pursuant to the acts 2d March, 1831, and 2d March, 1833.

II.

In 1872 the Commissioner of the General Land Office stated the account annexed to and forming part of these findings and the amount of $6,380.85 by him allowed to the State of Indiana has been paid to the claimant, though the claimant did not accept it as a final settlement of the demands; but it does not appear, either from the said account or from the evidence in the case, what part of the expenditures upon the National road was properly chargeable "to making a road to the said State," nor does it appear what proportion of such expenditures for making a road to the said State of Indiana was properly chargeable to the States of Ohio, Illinois, and Missouri.

III.

The account referred to in the preceding finding was allowed and certified by the Comptroller of the Treasury, but the questions now involved in this suit were reserved by the Comptroller for future consideration. The Comptroller's decision is hereinafter set forth. In 1873 the Secretary of the Treasury made an order that the account be re-examined, which is likewise annexed to these
9 findings; and on the 17th October, 1889, the claimant, by the governor of the State, made a formal demand upon the Commissioner of the General Land Office to state an account between the United States and the State of Indiana, in accordance with the

act 3d March, 1857. No further account than that above referred to has been stated by the Commissioner of the Land Office.

Account Stated, 1872.

(Referred to in the foregoing findings.)

Report No. 23447.—*Indiana.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December* 4, 1872.

SIR: Pursuant to the requirement of 2d sec. of the act of Congress approved 3rd March, 1857, entitled "An act to settle certain ac'ts between the United States and the State of Mississippi and other States," I have examined an ac. between the United States and the State of Indiana for the five per cent. accruing under act of 19th April, 1816, upon the net proceeds of the sales of the public lands to 31st December, 1871, and under act of 3rd March, 1857, upon the cash value of lands within her limits embraced by permanent Indian reservations, and find that there is due to said State as follows, viz:

Amount of balance due her 31st December, 1856, per report No. 13457, on ac. of 3 per cent. fund, as per certificate of the Register of the Treasury dated 1st July, 1872	$47 12	
Amount of two per cent. on $20,678,430.71, the net proceeds of the sales of the public lands from the 1st December, 1816, to 31st December, 1856, inclusive, as shown by the several adjustments of the 3 per cent. ac. specified in statement A, hereto annexed	413,568 61	
(NOTE.—In consequence of the expenses incident to the sale of the public lands in Indiana from the 1st January, 1857, to the 31st December, 1856, inclusive, having been in excess of the gross receipts, nothing has accrued to the State during that period, as shown by statement C.)		
Amount of 5 per centum on $126,674.52, the cash value of 101,339.62 acres, at $1.25 per acre, of lands situated within the limits of Indiana embraced by permanent Indian reservations, as per statement B	6,333 73	
		419,949 46

as will appear from the certificates of the Register of the Treasury and statement hereto annexed. By reference to the 3rd act of the 6th sec. of the act of 19 April, 1816, U. S. Stat. 3, p. 289, c. 57, it will be seen that two-fifths of the 5 per cent. accruing upon sales of the public lands in Indiana were to be reserved and applied, under the direction of Congress, to the making of a road or roads leading to said State; and by statement D, hereto annexed, it will be seen

that the *pro rata* of the sums from time to time appropriated for the construction of the Cumberland road, which by law were to be replaced in the Treasury out of the five per cent. accruing in Ohio, Indiana, Illinois, and Missouri, would more than absorb the entire amount of the two per cent. which has accrued upon the sales of lands in Indiana. Hence, in the absence of special legislation authorizing the two per cent. to be paid over, there would appear to be at present nothing payable to Indiana except $47.12, the balance due her 31st December, 1856, on the 3 per cent. account, and $6,333.73, being the 5 per cent. on $126,674.52, the cash value at $1.25 p'r acre of 101,339.62 acres of land within the limits of the State embraced by permanent Indian reservations, which, pursuant to the ruling of the Comptroller in the case of the account for Illinois, the former is entitled to under act of 3rd March, 1857. In consequence of the expenses incident to the sales of the public lands from 1st January, 1857, to 31st December, 1871, inclusive, being in excess of the receipts, nothing accrued to Indiana during that period.

WILLIS DRUMMOND,
Commissioner.

Hon. R. W. Tayler, 1st comptroller U. S. Treasury.

EXHIBIT D.

Statement Exhibiting the Dates of Certain Acts of Congress Making Appropriations for the Construction of the Cumberland Road.

Class No. one.—By the terms of the acts making the appropriations embraced in this class, the sums thereby appropriated are to be replaced in the Treasury out of the fund, two per cent., reserved for laying out and making roads to the States of Ohio, Indiana, and Illinois, by virtue of the acts admitting said States into the Union, viz:

1st sec., act	14th	April,	1818,	U. S.	Stat.,	v.	3,	page	426	$52,984 60		
2 "	"	14th	"	"	"	"	"	"	"	260,000 00		
											$312,984 60	
	"	3 March,	1819,	"	"	"	"		500	250,000 00		
	"	"	"	"	"	"	"	"	"	285,000 00		
											535,000 00	
	"	2 "	1831,	"	"	4,	"		469	100,000 00		
	"	"	"	"	"	"	"		470	950 00		
	"	"	"	"	"	"	"	"	"	2,700 00		
	"	"	"	"	"	"	"	"	"	265 85		
	"	"	"	"	"	"	"	"	"	75,000 00		
	"	"	"	"	"	"	"	"	"	66,000 00		
											244,915 85	
	"	3 "	1832,	"	"	"	"		457	100,000 00		
	"	"	"	"	"	"	"	"	"	100,000 00		
	"	"	"	"	"	"	"	"	"	70,000 00		
											270,000 00	
1st sec.,	"	24 June,	1834,	"	"	"	"		680	200,000 00		
"	"	"	"	"	"	"	"	"	"	150,000 00		
"	"	"	"	"	"	"	"	"	"	100,000 00		
											450,000 00	

1	"	"	3	March,	1835,	"	"	"	772	200,000 00	
1	"	"	"	"	"	"	"	"	"	100,000 00	
											300,000 00
1	"	"	"	"	1837,	"	"	"	195	190,000 00	
										100,000 00	
										100,000 00	
											390,000 00
											2,502,900 45

Class No. 2.—By the terms of the acts making the appropriations embraced in this class, the sums thereby appropriated were to be replaced in the Treasury out of the fund, two per cent., reserved for laying out and making roads under direction of Congress, to the States of Ohio, Indiana, Illinois, and Missouri, pursuant to the acts admitting the said States into the Union, viz:

1st sec., act		3d	March,	1825,	U. S. Stat.,	v.	4,	page	128		$150,000 00
"	"	25	"	1826,	"	"	"	"	151		110,000 00
"	"	2	"	1827,	"	"	"	"	215		170,000 00
"	"	19	"	1828,	"	"	"	"	275		175,000 00
"	"	2	"	1829,	"	"	"	"	351		100,000 00
"	"	2	"	1829,	"	"	"	"	351, &c.		50,000 00
2	"	31	May,	1830,	"	"	"	"	427	$100,000 00	
"	"	"	"	"	"	"	"	"	"	60,000 00	
"	"	"	"	"	"	"	"	"	"	40,000 00	
											200,000 00
1	"	"	2	July,	1836,	"	"	5,	"	71	200,000 00
"	"	"	"	"	"	"	"	"	"	"	250,000 00
"	"	"	"	"	"	"	"	"	"	"	150,000 00
											600,000 00
											1,555,000 00

11 *Certificates of the Comptroller.*

(Referred in the foregoing findings.)

TREASURY DEPARTMENT, COMPTROLLER'S OFFICE.

I admit and certify the above balance of $6,380.85 this 25th day of January, 1873; payable to Thomas A. Hendricks, governor of the State, at Indianapolis, Indiana, $47.12 from the 3 per cent. fund, and the residue, $6,333.73, from the 5 per cent. fund.

WM. HEMPHILL JONES,
Acting Comptroller.

John Allison, Esq., Register, etc.

FIRST COMPTROLLER'S OFFICE, *February 12th*, 1873.

Under the re-reference of this report by the Secretary of the Treasury, and in accordance with his request endorsed on these papers, the preceding certificate of the acting comptroller is hereby set aside and vacated, and the account will be held for further consideration as if such certificate had not been made.

R. W. TAYLER,
Commissioner.

John Allison, Esq., Register of the Treasury.

TREASURY DEPARTMENT,
COMPTROLLER'S OFFICE, *5th Feb'y*, 1874.

On further consideration I now reaffirm the decision and certificate of the acting comptroller, dated 25 Jan'y, 1873, as to the sum of $6,380.85, which is to be paid as therein stated; but all questions as to the further claim made by the State are reserved for future consideration; the sum certified to be paid to the Hon. Thos. A. Hendricks, governor of Indiana, at Indianapolis.

R. W. TAYLER,
Comptroller.

Order of the Secretary of the Treasury.

(Referred in the foregoing findings.)

TREASURY DEPARTMENT, *February* 10, 1873.

SIR: In pursuance of the authority given to the Secretary of the Treasury by the proviso to the act of March 30, 1868 (15 Statutes, page 54), I have to request that the account stated between
12 the United States and the State of Indiana by report No. 23447 of the General Land Office, certified by the acting comptroller, January 25, 1873, be re-examined by the comptroller and such action taken thereon as he may now deem proper. This request is made because, as I am informed, the statement of the account in said report and the certificate of the same conflicts with a former decision of the comptroller to which he adheres. The questions presented, as I learn, are pending in Congress, and I deem it proper to await legislative action before a final disposition be made of the claims of the State.

GEO. S. BOUTWELL, *Secretary.*

(J. A. S.)
R. W. Tayler, ESQ., first comptroller.

Conclusion of Law.

And upon the foregoing findings of fact the court decides as conclusion of law—

The petition of the claimant should be dismissed for the reasons set forth in the opinion of the court.

The findings requested by either party, except so far as they are embodied in the foregoing findings, are refused upon the grounds that they present legal points and conclusions of law and irrelevant matter.

Opinion.

NOTT, *J.*, delivered the opinion of the court:

This is an action brought by the State of Indiana to recover certain proceeds of the public lands pledged and set apart for its benefit, as is alleged, by the organic act for its admission to the Union.

The facts are chiefly facts of which the court can take judicial notice, excepting the amounts of certain receipts, payments, and expenditures, and those amounts are practically undisputed, being shown by the accounts of the Land Office and Treasury Department. The questions in the case, therefore, are substantially questions of law, and they will be better understood by segregating them within certain chronological periods.

1. The first period extends from the admission of Ohio in 1802 to the admission of Indiana in 1816.

The act 30th April, 1802 (2 Stat. L., p. 173, § 7), to enable the people of Ohio to form a constitution and State government and for the admission of such State into the Union contained the following provision:

That the following propositions be, and the same are hereby, offered to the convention of the eastern State of the said Territory, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States. * * * Third. That one-twentieth part of the net proceeds of the lands lying within the said State sold by Congress, from and after the thirtieth day of June next, after deducting all expenses incident to the same, shall be applied to the laying out and making public roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass: Provided, always, that the three foregoing propositions
13 herein offered are on the conditions that the convention of the said State shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the State, whether for State, county, township, or any other purpose whatever, for the term of five years from and after the day of sale (section 7).

This proposition was accepted by the convention of Ohio and the State entered the Union, having thus given and received the prescribed pledge. The next year this "one-twentieth part," or five per cent. of the net proceeds of lands which might be sold within the State, was divided; three per cent. of the proceeds was to be paid directly to the State, to be, however, applied to the laying out, opening, and making of roads within its borders. Act 2d March, 1803 (2 Stat. L., p. 225). From that time on the "one-twentieth part" *part* of the proceeds remained thus divided, and these two divisions of it have been familiarly known as the "three per cent. fund" and the "two per cent. fund," the former being disbursed by the State and the latter remaining in the custody and under the control of the General Government.

In 1806 Congress passed an act for the building of the National road from Cumberland to the Ohio through the States of Maryland, Pennsylvania, and Virginia. (Act 24th March, 1806, 2 Stat. L., 357.) Thirty thousand dollars was appropriated, to be paid out of

the two per cent. fund, or, if that was not sufficient, out of any money in the Treasury not otherwise appropriated, but to the latter alternative was attached the condition that money paid out of the public funds should be reimbursed out of the two per cent. fund as it might accrue. At the time of this $30,000 appropriation there was in the Treasury to the credit of the two per cent. fund $12,652.

In 1808 the construction of the road was begun, and between that time and the admission of the State of Indiana there was appropriated for that purpose, including the $30,000 previously appropriated, $710,000, as shown by the following table:

Act of March 24, 1806 (vol. II. S. L.)	$30,000
Act of Feb. 14, 1810 (vol. II, S. L., p. 555)	60,000
Act of March 3, 1811 (vol. II, S. L., p. 661)	50,000
Act of May 6, 1812 (vol. II, S. L., p. 730)	30,000
Act of March 3, 1813 (vol. II, S. L., p. 829)	140,000
Act of Feb. 14, 1815 (vol. III, S. L., p. 206)	100,000
Act of April 16, 1816 (vol. III, S. L., p. 282)	300,000
Total	710,000

All of these appropriations were for the building of a road to the State of Ohio, and every act provided in substance that money paid out of the public funds should be reimbursed from the two per cent. fund.

At this time the expenditures upon the National road were largely in excess of the moneys credited to the two per cent. fund, which, in 1825, amounted to only $200,000. Such was the condition of affairs when Congress passed the act for the admission of Indiana to the Union.

2. The second period extends from the admission of Indiana in 1816 to the abandonment of the National road in 1835.

The act for the admission of Indiana to the Union, the act 19th April, 1816 (3 Stat. L., p. 289), like the Ohio act, proffers to the State the one-twentieth part of the proceeds of the public lands, and upon the same condition that lands sold by the United States
14 should be exempt from State taxation for a period of five years. The proposition differs from that of the Ohio acts, 1802, 1803, in only one particular, that it does not refer to "navigable waters emptying into the Atlantic" as the eastern terminus of the road, but simply declares that two-fifths of the one-twentieth part—that is to say, the two per cent. fund—"shall be reserved" and applied "to the making of a road or roads leading to the said State under the direction of Congress." The language of the act is as follows:

Third. That 5 per cent. of the net proceeds of the lands lying within said Territory, which shall be sold by Congress, from and after December 18, 1816, after deducting all expenses incident to the same, shall be reserved for the making of public roads and canals, of which three-fifths shall be applied to those objects within said State, under the direction of the legislature thereof, and two-

fifths to the making of a road or roads leading to said State, under the direction of Congress.

Fourth. One entire township shall be reserved, to be designated by the President of the United States, in addition to the one heretofore reserved for the use of a seminary of learning, to be appropriated solely for the use of said seminary by the legislature of said State.

Fifth. That four sections of land be granted to the said State for the purpose of fixing their seat of government, to be located at any time in such township and range as the legislature may select.

That the five foregoing provisions herein offered are on condition that the convention of said State shall provide by ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States from and after the 1st day of December next shall be and remain exempt from any taxes made by the order or authority of the State, whether for State, county, or township or any other purposes whatever, for the term of five years from and after the date of sale.

Subsequent to the admission of Indiana the States of Illinois, Missouri, Alabama, and Mississippi came into the Union and each State entered into an agreement with regard to the public lands that might be sold within its territory which was identical in terms with the foregoing statute so far as it relates to the two per cent. fund, and indeed the only variation in the disposition of the "one-twentieth part" of the proceeds of the public lands was that in the State of Illinois the three per cent. fund was to be applied to the encouragement of learning within the State instead of to the making of roads. In 1818 Congress appropriated money for completing the National road between Cumberland and Wheeling (act 14th April, 1818, 3 Stat. L., p. 426), and in 1820 began a series of enactments and appropriations for the construction of the road from the Ohio to the Mississippi through the States of Ohio, Indiana, and Illinois. (Act 15th May, 1820, 3 Stat. L., 604.) These acts are thus analyzed by the counsel for the State of Illinois, Mr. Howard, in another case:

After the admission of Missouri the appropriations are limited and restricted in different and curious manners. Commencing with the act of March 3, 1825, and going on regularly, March 25, 1826, March 2, 1827, March 19, 1828, March 2, 1829 (two acts), and May 31, 1830, the provisions are that the moneys shall be replaced out of the two per cent. funds of Ohio, Indiana, Illinois, and Missouri. Then follows a series of acts, viz., March 2, 1831, March 3, 1832, June 24, 1834, March 3, 1835, in which the moneys are to be replaced out of the reserved funds of Ohio, Indiana, and Illinois, not mentioning Missouri. Then on July 2, 1836, the moneys were to be replaced out of the reserved funds of the four States, including Missouri again. Then come the last acts, March 3, 1837, and May 25, 1838, which provide that the several sums appropriated should be replaced by the States, respectively, out of the fund reserved for each. We have thus five kinds of appropriations—first, generally out of moneys in the Treasury not otherwise appropriated; second,

charged to the State of Ohio fund; third, charged to the fund of the States of Ohio, Indiana, and Illinois; fourth, charged to the fund of Ohio, Indiana, Illinois, and Missouri; fifth, charged to the fund of the State in which work was done. Some of these come within the terms of the original compacts; some do not.

15 In 1822 the road had been finished from Cumberland to Wheeling, 132 miles, at a cost of nearly $20,000 a mile, and was in process of construction through the State of Ohio. Congress were then face to face with the fact that a great highway, covered by endless wagon trains which passed over it ceaselessly day and night, required superintendence, repairs, and constant expenditures. The public at large were unwilling to maintain at what was then deemed great expense a free road for the benefit of a few States. The remedy of the time was to impose tolls upon the traffic of a road. Accordingly a bill passed both houses for the erection of toll gates and the imposition of tolls, but it was vetoed by President Monroe, because he doubted the constitutional power of Congress to impose tolls within the territory of a State.

The action of the President left the Government and people of the United States in the unpleasant position of owning a road (with the consent of the several States through which it ran) upon which they could constitutionally expend money to any amount, but from which they could not constitutionally derive anything. Notwithstanding this constitutional light upon the subject, the people at large were not willing to continue the policy of expenditure, and a policy of abandonment necessarily set in.

That policy gradually took form and effect in the provisions of numerous statutes, the general purpose of which was that the Government should complete the National road from the Ohio to the capital of Missouri, but that as fast as completed it should be surrendered to the States through which it ran. The following are the statutes referred to:

Act of March 2, 1829 (vol. IV, S. L., p. 351, 352).
Act of March 3, 1829 (vol. IV, S. L., p. 363, 364).
Act of May 31, 1830 (vol. IV, S. L., p. 427, 428).
Act of March 2, 1831 (vol. IV, S. L., p. 469).
Act of March 2, 1831 (vol. IV, S. L., p. 483, 486).
Act of March 2, 1833 (vol. IV, S. L., p. 655).
Act of June 24, 1834 (vol. IV, S. L., p. 680, 681).
Act of March 3, 1835 (vol. IV, S. L., p. 772).
Act amendatory (vol. IV, S. L., p. 772).
Act of July 2, 1836 (vol. V, S. L., p. 71, 72).
Act of March 3, 1837 (vol. V, S. L., p. 195, 196).
Act of May 25, 1838 (vol. V, S. L., p. 228).
Act of Sept. 4, 1841 (vol. V, S. L., p. 457).
Act of Aug. 11, 1848 (vol. IX, S. L., p. 283).
Act of Jan. 20, 1853 (vol X, S. L., p. 152).
Act of May 9, 1856 (vol. XI, S. L., p. 7).

But so far as the present cause of action is involved which relates to the supposed obligation of the Government to build a road "leading to said State" of Indiana, it is sufficient to say that before such

a road was completed Congress, by the act 2d March, 1831 (4 Stat. L., pp. 483, 486), authorized the State of Ohio to assume control of a portion of it and to erect toll gates thereon, and by the act 2d March, 1833 (*ib.*, p. 655), granted similar powers to the State of Virginia; that, on the completion of the road in the States of Maryland, Pennsylvania, and Virginia, Congress surrendered it to those States by the act 24th June, 1834 (*ib.*, p. 680), and that by the act 3d March, 1835 (*ib.*, p. 772), appropriations were provided for the completion of the road in the States of Ohio, Indiana, and Illinois and for repairs on the road east of the Ohio, but the act for-
16 bade that the money so appropriated for repairs should be expended until the road east of the Ohio had been surrendered to and accepted by the States through which it passes.

Finally, it is to be said that the appropriations continued after the recessions to the different States until the road was completed across the State of Ohio and to the State of Indiana; that it was not equal in construction or quality to the road east of the Ohio, but nevertheless had been graded, bridged, and made a public highway, and that its cost exceeded all of the moneys which the Government has received from the two per cent. funds of all the States which have thus contributed to its construction.

3. The third period extends from the abandonment of the National road as a national work, in 1831, 1833, and 1835, to the final legislation of Congress in regard to the two per cent. fund.

There are but three acts of Congress in this period which directly affect the rights of the present claimant. The first of these is the act 4th September, 1841 (5 Stat. L., p. 457, §§ 1, 16, 17), "An act to appropriate the proceeds of the sales of the public lands and to grand pre-emption rights." It provides for the distribution of the proceeds of the public lands among the States and Territories of the Union, with a special reservation in favor of some of them, among which is Indiana, but nevertheless with this proviso:

That the sum so allowed to the said States, respectively, shall be in nowise affected or diminished on account of any sums which have heretofore or shall hereafter be applied to the construction or continuance of the Cumberland road, but that the disbursements for the said road shall remain, as heretofore, chargeable upon the two per centum fund provided for by the compacts with several of the States.

After many other provisions of a general nature the statute proceeds to deal specially with the cases of Alabama and Mississippi by the following enactments:

SEC. 16. And be it further enacted, That the two per cent. of the net proceeds of the land sold, or that may hereafter be sold, by the United States in the State of Mississippi since the first day of December, eighteen hundred and seventeen, and by the act entitled "An act to enable the people of the western part of the Mississippi Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," and all acts supplemental thereto, reserved for the making of a road or roads leading to said State, be, and the

same is hereby, relinquished to the State of Mississippi, payable in two equal installments, the first to be paid on the first of May, eighteen hundred and forty-two, and the other on the first of May, eighteen hundred and forty-three, so far as the same may then have accrued, and quarterly, as the same may accrue, after said period: Provided, that the legislature of said State shall first pass an act, declaring their acceptance of said relinquishment in full of said fund, accrued and accruing, and also embracing a provision, to be unalterable without the consent of Congress, that the whole of said two per cent. fund shall be faithfully applied to the construction of a railroad, leading from Brandon, in the State of Mississippi, to the eastern boundary of said State, in the direction, as near as may be, of the towns of Selma, Cahaba, and Montgomery, in the State of Alabama.

SEC. 17. And be it further enacted, That the two per cent. of the net proceeds of the lands sold by the United States in the State of Alabama since the first day of September, eighteen hundred and nineteen, and reserved by the act entitled "An act to enable the people of the Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States," for the making of a road or roads leading to the said State, be, and the same is hereby, relinquished to the said State of Alabama, payable in two equal installments, the first to be paid on the first day of May, eighteen hundred and forty-two, and the other on the first day of May, eighteen hundred and forty-three, so far as the same may then have accrued, and quarterly as the same may thereafter accrue: Provided, that the legislature of said State shall first pass an act declaring their acceptance of said relinquishment, and also embracing a
17 provision, to be unalterable without the consent of Congress, that the whole of said two per cent. fund shall be faithfully applied, under the direction of the legislature of Alabama, to the connection, by some means of internal improvement, of the navigable waters of the bay of Mobile with the Tennessee river, and to the construction of a continuous line of internal improvements from a point on the Chattahoochee river, opposite West Point, in Georgia, across the State of Alabama, in a direction to Jackson, in the State of Mississippi.

The second statute in this period was the act 2d March, 1855 (10 Stat. L., p. 630), which directs the Commissioner of the Land Office to state an account of the one-twentieth part or five per cent. fund with the State of Alabama, and requires him to include in it the lands appropriated for Indian reservations.

The third and last statute is the act 2d March, 1857 (11 Stat. L., p. 200), which directs the Commissioner to state an account with the State of Mississippi "upon the same principles of allowances and settlement," and also (by a subsequent section) to state an account with "each of the other States upon the same principles" and "allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at $1.25 per acre."

Under the statute last cited the Commissioner of the General Land Office stated an account in 1872 and allowed a balance of $6,380.85, which was paid to the claimant. But it is proper to add that the claimant did not accept that amount as a final settlement, and that the Comptroller of the Treasury, when admitting and certifying the balance allowed by the Commissioner, expressly "reserved for future consideration" the questions which are now presented by this suit. In 1889 the governor of Indiana made a formal demand upon the Commissioner to state an account in accordance with the act 1857, but the Commissioner has rested upon the account previously stated. Many other statutes and proceedings and facts were cited or adverted to by counsel on one side or the other in the progress of the argument, but in the view of the case taken by the court the foregoing, it is believed, are all which bear directly upon the questions to be decided.

The position maintained by the counsel for the claimant, as understood by the court, may be summarized in the following propositions:

(1) That the two per cent. fund created by the Indiana act, 1816, was irrevocably pledged to an expressed purpose, and the purpose could not be modified or abandoned without the consent of the State.

(2) That the release from State taxation of lands which the Government might thereafter sell constituted a good and valuable consideration.

(3) That the Indiana act must be read *in pari materia* with the Ohio act, and so read they bound the Government to construct a road from navigable waters on the Atlantic coast to the State line, and of the quality and excellence prescribed by law for the road then in process of construction.

(4) That such a road has never been constructed, Cumberland, the eastern terminus, not being on navigable waters and the road west of the Ohio not coming up to the standard prescribed by law for the section between Cumberland and Wheeling.

(5) That the abandonment of the road as a natural highway, its recession to the several States through which it passes, and the permission given to some of the States to erect toll gates and
18 exact tolls constituted a breach of the compact, rendering the Government liable to the State for all of the moneys reserved for the two per cent. fund.

And, finally, that the act 1857 was intended to accomplish this restitution, or at least to operate retroactively so far as to place "the other States" on a footing with Alabama and Mississippi as effectually as if they had been included in the act 1841, at the same time, in effect, creating a trust which relieved the claim from the operation of the statute of limitations. These positions have been maintained with great ability, not only by the learned counsel in this case, but by the counsel in the kindred cases of Ohio and Illinois, and they have been fortified by a comprehensive review of many statutes and decisions, of many legislative resolutions and reports,

and the opinions of eminent statesmen and well-known lawyers and jurists.

But the position of the claimant will, perhaps, be more accurately and tersely defined by an extract from the petition:

The defendant agreed to pay your petitioner 3 per cent. of the 5 per cent. of the net proceeds of the sale of lands and to extend the remaining 2 per cent. thereof in the making of a road or roads leading to the said State under the direction of Congress.

And by an extract from the claimant's proposed findings of fact:

The 5 per cent. fund was the property of the individual States, and Congress but the trustee to direct the expenditure of two parts of it to an express object—"the making of a public road leading to the State" of Indiana.

And by an extract from the opinion of an eminent lawyer, ex-Attorney General Cushing, quoted in the claimant's brief:

It is *is* plain to see that Congress, by enacting the laws in question, did, in effect, as we have previously shown, solemnly recognize and proclaim its abandonment of all claim to these trust funds and the surrender thereof to the respective States.

The first question which the court designs to consider is the responsibility of the Government under the act 1816 and its consequent liability to the claimant at the time when the act 1857 was passed. In this inquiry we shall assume that the claimant's position is correct; that the two per cent. fund "was the property of the individual States, and Congress but the trustee to direct the expenditure."

Conceding substantially all of the minor positions taken by the claimant; conceding that the act 1816 created an irrevocable compact obligatory upon the Government and supported by a good and valid consideration; conceding that the road contemplated was to run from navigable waters on the Atlantic coast, and that Cumberland was not a proper terminus within the intent of the compact; conceding that the Government abandoned the undertaking before completion and surrendered the unfinished road to the different States in which it was situated and authorized them to assume the management of it and impose tolls upon interstate traffic over it; conceding all of these things, it does not follow that there was such a perversion of the trust as to make the Government liable for the moneys which it received or to entitle the State to recover them to its own use.

The Government did not agree, through the medium of these statutes, to build and complete a road from one point to another at its own cost and charge in consideration of the renunciation of taxation and of the moneys reserved from the sales of public lands. If there had been such an agreement there would have been no
19 trust. The compact would have been a simple contract to do a specific thing for a specific consideration, and the amount which one contracting party might acquire from the sales of its own lands would not concern the other. If there be a trust in this case it is simply to receive and disburse the money of the other party—*i. e.*

the money of the *cestui que trust.*—and if there be any responsibility attached to such a trust it is merely to disburse the money in reasonable time, honestly, disinterestedly, and for the declared purposes of the trust.

If the Government by the act 1816 agreed to do more than this—if it agreed for a valuable consideration to do a specific thing and did not—its failure to perform was a plain breach of contract, and the claimant in 1857 was only a contractor seeking damages for the breach. What, then, was it that the Government agreed to do? It agreed that "five per cent. of the net proceeds of the lands lying within the said territory" should be "reserved," and that much of the agreement has confessedly been performed. It agreed that three-fifths of this five per cent. should be paid to the State, and that obligation has been discharged. It also agreed that two-fifths should be "applied to the making of a road," and if there be any trust it is in the application of that money to that purpose.

That purpose was a public highway which should connect certain of the inland States with the Atlantic seaboard. Manifestly such a road could not be begun and finished by one operation from end to end. Manifestly there had to be a beginning long before there could be a completion. In the absence of specific instructions in the terms of a trust, to say nothing of the provision that this should be done "under the direction of Congress," the trustee would be invested with all needful discretion. Whether the road should be begun at the eastern terminus and built westward, whether it should be begun at the western terminus and built eastward, or whether it should be built by intermediate sections where it was most needed were questions inevitably involving discretion and upon which the *the* discretion of a trustee could be properly exercised.

All that a trustee would be bound to do in such a case would be to expend the trust fund without unreasonable delay according to his best judgment for the good of the *cestui que trust.* Cumberland may not have been a proper terminus for the National road within the intent of the trust as defined in the Ohio act (1802), but the section between Cumberland and Wheeling certainly was within the contemplation of the statute, and if it absorbed all of the trust fund properly applicable thereto assuredly that discharged the trustee. Not until it appears that the Government has money in its treasury, which should have been "applied" to the object of the trust, or until it appears that its expenditures of the fund were a perversion of the trust, can it be held accountable as a trustee. A trustee cannot be held responsible because a trust fails to accomplish all that was hoped or promised.

The court can preceive no perversion of the trust in the manner in which the National road was laid out; and, on the contrary, the manner in which the work was prosecuted through the States of Maryland, Virginia, and Ohio, so far as the facts are known to the court, seems to have been a sound exercise of a reasonable discretion.

Neither can the court regard the methods adopted for maintaining the road after it was constructed by its surrender to the different

States through which it passed as an illegal abandonment of
20 the trust negativing everything that had been done and rendering the Government liable for everything that it had received.

The statutes which contemplated the construction of a national road did not provide for its maintenance after its completion. They may have created a trust founded upon a valuable consideration, but they certainly did not require the trustee to maintain a free road at its own, the trustee's, cost. The funds derived from the sale of public lands in Indiana and the other designated States merely contributed toward the cost of building the road; yet, if it had been built wholly of those funds, the discretion would still have remained in Congress of determining whether it was so far national, was so much for the general welfare, that it should be kept free at the public expense, or whether it should be maintained, as most thoroughfares were at that day, by imposing tolls upon those who used it.

If the road had been built entirely out of these so-called trust funds and Congress had then sold it to the highest bidder for more than it had cost, the trustee making money out of the trust, and had authorized that bidder in turn to charge exorbitant tolls and make more money out of it, a question would be presented which is not now involved. Here the trustee made nothing out of the trust; the road to be useful had to be maintained; there was no fund wherewith to maintain it; there was no obligation to maintain a free road; the cost of keeping a much-traveled road in order was well known to be a large percentage of its prime cost, and Congress assuredly, without a breach of faith, might make the proper State governments the custodians of the road and authorize them to maintain it by the customary expedient of imposing tolls.

Neither can the court regard the appropriations for the National road as an inoperative application of the trust funds to their legitimate object. A trustee in such a case would not be bound to keep the trust moneys in a separate parcel and pay them out *eo nomine* as he received them; the advancing of money before it was received was no injury to the *cestui que trust.* nor advantage to the trustee, and the directions in the appropriation acts that this appropriation and that appropriation be paid out of any money not otherwise appropriated, but be charged as a payment on account of the two per cent. fund, was a mere matter of book-keeping. As legislation, the appropriation acts expressed the legislative intent that the avails of the public lands—the two per cent. fund—should be applied to that object and in that way. The object was avowedly the one for which the trust, if any, was created. The method was one which could not injure the *cestui que trust.* nor benefit the trustee, and which effected the purpose of the trust in the most direct manner. Whether there are still funds in the Treasury derived from the sales of public lands in Indiana which have not been applied to the object of the trust is another question which will now be considered.

The Government, as has been said, was not bound to build the

National road out of public funds, and cannot be deemed to have misapplied the moneys which it received in trust by the methods of construction and maintenance which it adopted; but at the same time a trustee cannot throw half a dozen trusts into hodge-podge and set up a general defense against his liability in each. The object here was a common one—the building of a road; but not altogether a common one, for a State was only interested in the
21 application of the two per cent. fund toward a road east of its own boundary line and was not responsible for what had been built or done before it entered the Union. The compact with the Government was prospective, not retroactive, that the two per cent. fund should thereafter be "applied" "to the making of a road." Each State was entitled to have all of its two per cent. fund invested in the road irrespective of what others were doing or had done; and if the Government mingled the trust funds each State is entitled now, under the act 1857, to its due proportion of whatever balance may remain unexpended. The Government could not receive $100,000 from Ohio, $100,000 from Indiana, and $100,000 from Illinois without expending $300,000 on the road. From 1802 to 1816 Ohio had been the only party to the arrangement, and during that period the Government had expended much more upon the road than it had received from the sale of lands within the State; but the moneys received from Indiana lands cannot now be applied upon that deficiency. The State of Indiana was entitled to have all of the two per cent. fund derived from lands within its borders expended, not for the payment of old debts or the making good of an overdrawn account, but for the construction of a road. The account to be stated must begin when that State entered the Union.

From the time when Ohio and Indiana became joint contributors to the common object, the question for an accountant is whether the joint contributions exceeded the expenditures of the Government. As each new State came into the arrangement its contributions would in like manner swell the responsibility of the Government and be taken into the account until the road reached the State line, *i. e.*, until a road was made "leading to the said State." Then the account so far as Indiana was concerned would stop, and the road constructed westward of its eastern line would be chargeable only to the States toward which it led. Chronologically the account must open when a State entered the Union, geographically it must close when the road arrived at its boundary line. Such an account will involve an accounting with all the States; for while the Government has advanced much more than it has received, yet nevertheless it is possible that there is one or more States whose two per cent. fund was larger than the expenditures properly chargeable to it.

No such account was presented by either party upon the argument, and it is too involved to be framed by the court from an inspection of the statements of the Land Office; but at the same time the court must infer from the concessions of counsel and the returns of the Land Office and Treasury Department that the expenditures

exceeded the receipts in all cases, and that if a proper account were made up no surplus would appear in which the State of Indiana would be entitled to participate by virtue of the original trust as defined in the organic act.

The ultimate question before the court, accordingly, is whether the State of Indiana acquired a new right to these proceeds of the public lands by virtue of the final legislation of Congress; or, stated more specifically, whether the intent of the act 1857 was that an account should be stated *de novo* in which all of the credits to the State from the two per cent. fund should remain, and all of the debits for expenditures made by direction of the various appropriation acts be expunged?

There is no obligation in the case, moral, legal, or equitable, to guide the court toward the true intent of this legislative
22 action. The Government had done all that it had agreed to do and more, and had the right to continue to apply the two per cent. moneys upon its own advances until it should fully reimburse itself. But Congress also had the power to wind up this business of road-building, to close the account, to carry the deficit to profit and loss, and relinquish the diminished avails of the public lands to the States directly interested in them, or to make a gift of all that had been received since the States entered the Union without an obligation, legal or equitable, to do so. Whether the relinquishment should date from one day or another, from 1816 or from 1857, was equally within the power of Congress, and alone by Congress could be determined.

The first renunciation by the Government of its right to control and disburse the two per cent. fund was by the act September 4, 1841 (5 Stat. L., p. 453, §§ 16, 17). The counsel for the United States has contended that this was not a relinquishment of the fund to the States named in the act in their own right, but that they were merely substituted as custodians of the fund upon certain conditions, which were that they should agree to expend it in designated improvements of a public nature. This is conceded, but it is averred in reply that nevertheless the Government relinquished its right to repayment of advances from that fund and that the relinquishment was irrevocable. The relinquishment, however, was only to the States of Alabama and Mississippi, and the statute did not extend directly or by implication to the other States. There may have been reasons why this favor should have been extended exclusively to those two States, such as their greater need, that they had received less benefit from the public expenditures than the other States, and the like, and such reasons cannot be questioned here; they are legislative, not judicial.

In 1855 a dispute apparently had arisen between the State of Alabama and the General Land Office as to the proceeds of the public lands, and it appeared that the Government, instead of selling all of the public lands within that State, had appropriated portions of them to its own uses and purposes by ceding them as Indian reservations. Accordingly the act 2d March, 1855 (10 Stat. L., p. 630), was passed, which required the Commissioner of the Land

Office to state an account between the Government and the State of Alabama, and "to include in said account the several reservations under the various treaties with the Chickasaws, Choctaws, and Creek Indians within the limits of Alabama." No "principle" for stating such an account is prescribed by the act, unless it be the declaration that Indian reservations shall be regarded as sales and credited to the State in the account.

Such was the state of the case when the final statute was passed, the act 3d March, 1857 (11 Stat. L., p. 200). Its primary purpose was to extend to the State of Mississippi the additional favor which had been extended to Alabama by the statute of the preceding Congress. So far it was clear and consistent, for Alabama and Mississippi stood upon precisely the same footing under the act 1841, and in the fact that large quantities of the public lands within their territorial limits had been ceded to the Chickasaw and Choctaw Indians. The first section of the act accordingly provided:

That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled on account of the public lands in said State, and upon the same princi-
23 ples of allowance and settlement as prescribed in the act to settle certain accounts between the United States and the State of Alabama, approved the 2d of March, 1855; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to said State 5 per centum thereon, as in case of other sales, estimating the lands at the value of one dollar and twenty-five cents per acre.

But the words "and other States" were added to the title, and a second section was appended to the enactment. It is in these words:

SEC. 2. And be it further enacted, That the said Commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre.

This second section, therefore, in the use of the words "upon the same principles," refers to the first, and the first in the same manner refers to the act 1855; and the act 1855 specifies no "principle" for the statement of an account other than that the reservations ceded to Indians should become an item of credit to the State, and neither statute indicates an intent to prescribe any other change in the account or to create a new liability on the part of the United States by revoking all the charges for moneys advanced which had been expressly ordered, not by the Land Office or the accounting officers, but by nearly all the appropriation acts authorizing expenditures upon the National road.

Having thus directed the Commissioner of the Land Office to state an account and instructed him as to the principle upon which

he should proceed, the act 1857 commands "and (he) shall allow and pay to each State such amount as shall thus be found due." Finally, it adds to the foregoing instruction and mandate another, "estimating all lands and permanent reservations (instead of reservations for the Chickasaw and Choctaw Indians) at one dollar and twenty-five cents per acre."

Up to this time the States referred to as "each of the other States" had had no legal right to an accounting, for the administration of the fund rested exclusively with the Government, and these States were not entitled to recover or receive the money which such an accounting might show to the credit of the fund still unexpended for the purposes of the trust.

The act 1857, therefore, seems to the court to have accomplished three things: 1st, by directing the Commissioner of the Land Office to state an account it provided a remedy, such as it was, for the several States, which, moreover, was the only remedy within their reach, this court not then having jurisdiction of their claims; 2d, it created a new liability on the part of the Government by making the permanent reservation of the public lands equivalent to a sale and the Government a purchaser at the usual price per acre; 3d, it created a new or statutory right of action by making the *cestui que trust.* a beneficiary at law in authorizing the States to receive directly the money which theretofore had been held in trust for their benefit.

It is not thought by the court that this statute did more or that it could have been intended to do more. The advantages which the States of Alabama and Mississippi acquired over "the other States" was not by virtue of the act 1857 nor by virtue of the act 1855, but by virtue of the act 1841, which changed the relations of the parties and substituted those States as trustee, giving them a legal right to the custody of the fund, under certain specified conditions, which have never been extended to the other States.

24 There is no "principle" indicated in the act 1855 which could possibly operate upon such expenditures for the National road as had become charges against the two per cent. fund under the authority of the appropriation acts. Consequently the sole benefit which the State of Alabama acquired by virtue of that statute was a credit for the lands taken for Indian reservations. The same thing is true of the act 1857 when applied to the State of Mississippi. That State derived no benefit from that statute beyond the credited item of the Indian lands. It therefore seems impossible that the "principle" which gave nothing to Alabama and Mississippi but a new item of credit for Indian reservations could confer, when extended to "the other States," another and distinct benefit upon them, and, by retroactive operation, practically work a repeal of all the legislation which had made the appropriations for the National road a charge upon the two per cent. fund.

If it was so intended by Congress, there should have been added to the second section the words "And the Commissioner shall also allow and pay to each State two per cent. of the net proceeds of the public lands since such State entered the Union, notwithstanding the various provisions of law which direct that such two per cent.

shall be applied to the construction of the National road or to the reimbursement of the Government for moneys advanced for that project." The judiciary cannot import such a provision into a statute by inference or interpretation. To state an account implies a statement of debits and credits. To command a public officer "to state an account" and pay "such amount as shall thus be found due," is a very different thing from making a gift to the other party *ex gratia* of all the moneys that happen to appear on one side of it.

As it is possible that a balance may be due to the claimant on a proper accounting, we proceed to the consideration of a question which has been elaborately argued, the question of the statute of limitations.

As has been said, the only remedy which the States possessed in 1857 was the authority conferred on the Commissioner of the General Land Office to state an account and pay over the balance which he might find to be due. In 1863 Congress provided another remedy, an action in this court. If the accounting of the Commissioner of the Land Office was not essential or a prerequisite to a right of action, the claim accrued as soon as the act 1857 was passed, and, accruing then, necessarily became barred by the statute of limitations on the 3d March, 1866 (12 Stat. L., p. 765, § 10). If, on the contrary, the accounting of the Commissioner was a prerequisite to an action in this court, and no claim existed on which an action could be brought until his account was stated and he had "allowed" and "found due" a certain "amount," then, from the nature of things, his proceeding was judicial and his jurisdiction exclusive, and the "amount" which he might "allow" was an award, and the only action which could be maintained would be an action upon it for the "amount" "found due."

Either of these alternatives is fatal to the claimant's case, if that case rests on the act 1857. The trust was then at an end; the State of Indiana was then authorized and empowered to act on its own behalf and in its own right; a new cause of action was then created and a new right of action given. We can perceive no reason why the action could not have been brought as well in 1864 as in
25 1889, unless it be the reason that the court did not have jurisdiction of the claim, and if the court did not then have jurisdiction of the claim it was because an exclusive jurisdiction was vested in the Commissioner of the Land Office.

In the earlier part of this decision we have considered the case as if a trust existed, but it is by no means clear that the agreement or compact between the Government and the State of Indiana, as declared by the act of admission amplified by the act 1857, constituted a trust which would take the claim out of the operation of the statute of limitations within the intent of the leading case of Kane *v.* Bloodgood (7 Johns. Ch. R., 69) and the case most relied upon, Irene Taylor (104 U. S. R., 216).

The money termed a trust fund was not money of the State of Indiana confided to the Government for a purpose nor was it money of a third person paid to the Government for the use and benefit of the State; on the contrary, the two per cent. fund was always the

money of the Government derived from the sale of its own property, and the statute creating the fund was in terms but an agreement that the Government should expend a designated though indeterminate amount of its own money in the construction of a public work more or less beneficial to the other party.

The State of Indiana never had an exclusive interest in the fund or in the work which was the purpose and object of the trust. The road to be constructed—the road "leading to the said State"—would not lie within its territory; the State would not be entitled to rents, issues, or profits therefrom; the utmost legal interest which could be possessed in the thing itself was a right of free transit for its citizens and agents—a right which would be shared by all the world. If the purposes of the trust had been fully carried out and a road had been completed from Baltimore to Indiana, according to the extremest view of the obligation resting on the Government, the State as a body corporate would not have had therein the shadow of a property right. The trust has been ascribed to the act 1857, but an agreement to pay money does not make the amount specified the money of the other party, and a gift of money, though by statute, does not pass a property in it till the money be paid. In the case of Mrs. Taylor (*supra*) the realty which was sold was her property and the surplus which was in the Treasury was her money and the statutory declaration that the Government would hold it until demanded by the owner necessarily created a trust.

In speaking of the act 1841 and the course pursued by Congress in relation to the States of Alabama and Mississippi the court has spoken in this opinion upon the assumption that the condition of the 2 per cent. fund in those States was substantially the same as that of "the other States" referred to in the act 1857. The argument pressed upon the court was that the public land laws are to be read *in pari materia;* that it has never been the policy of Congress to grant exceptional favors to single States and deny them to others in like circumstances; that by the act 1841 there was inaugurated a policy of restitution, and by the act 1857 this policy was extended to all "the other States" which in like manner had been entitled to the percentage of the public-land sales erroneously or improperly expended on an unfinished road, and that "upon the same principles" which governed the restitution of the fund to Alabama and Mississippi it must be restored to the other States.

26 But, as a matter of fact, the cases are not parallel, and "the same principles" which governed the payments to Alabama and Mississippi are fatal to a recovery in this suit. The difference between the two classes of States is that the 2 per cent. fund of Alabama and Mississippi was never expended on their behalf and no appropriations were ever made chargeable against it. The payment under the act 1841 was payment for the first time. They were then entitled to have the fund expended (not to expend it themselves, but to have it expended); their right to that was unquestioned, for Congress had never assumed to expend it or made an expenditure chargeable against it. The acts 1841, 1855, 1857 repealed no statute by implication and did nothing more than carry out for the first

time the obligation assumed by the General Government when the two States were admitted to the Union, and no principle embodied in those statutes by any possible construction would compel the Government to pay or expend for those States the 2 per cent. fund a second time. By the fact that the Government had expended nothing on their behalf when the acts 1841, 1855, 1857 were passed the analogy between them and "the other States" is destroyed.

The judgment of the court is that the petition be dismissed.

(Indorsed: Filed June 30, 1892.)

27 *Judgment of the Court.*

STATE OF INDIANA
vs.
THE UNITED STATES. } No. 16677.

Nott, judge, read the opinion of the court, and judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

28 In the Court of Claims.

THE STATE OF INDIANA
vs.
THE UNITED STATES. } No. 16677.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, and of the final judgment of the court.

And I further certify that application of the claimant for allowance of appeal to the Supreme Court of the United States was filed August 2, 1892, and allowed by Chief Justice Richardson.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 13th day of September, 1892.

[Seal of Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 15,132. Court of Claims. Term No., 1162. The State of Indiana, appellant, *vs.* The United States. Filed September 14, 1892.

1488. &c.

Supreme Court U.S.
FILED.
JAN 9 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE STATE OF INDIANA, Appellant,

vs.

THE UNITED STATES.

Term No. 1162.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

WM. E. EARLE,
1417 G Street N. W.,
Washington, D. C.

Press of McGILL & WALLACE, Washington, D. C.

Supreme Court of the United States.

THE STATE OF INDIANA
vs.
THE UNITED STATES.

BRIEF FOR APPELLANT.

ASSIGNMENT OF ERRORS.

Errors are assigned by the appellant as follows:

I. That the court erred in treating the claim of Indiana as resting upon the failure of the Government to build the National Turnpike, whereas it is based upon the express provisions of the second section of the act of 1857, whatever may have induced Congress to enact that statute, and the failure to build the road was only suggested in argument as a motive by way of incidental explanation of the statute.

II. That under the second section of the act of 1857 it was immaterial what moneys had been expended by the Government toward the construction of the National Turnpike.

III. That the two-per-cent. fund reserved to be expended under the direction of Congress in building a road to the State of Indiana was not a trust fund because it "was not money of the State of Indiana confided to the Government for a purpose, nor was it money of a third person paid to the Government for the use and benefit of the State."

STATEMENT OF THE CASE.

This action was brought in the Court of Claims to recover the sum of $412,184.97 due the State of Indiana under section 2 of the following act of Congress (11 S. L., 200):

"*Be it enacted* * * * That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled on account of the public lands in said State, and *upon the same principles of allowance and settlement* as prescribed in the 'act to settle certain accounts between the United States and the State of Alabama,' approved March 2, 1855, *and that he be required to include* in said account *the several reservations* under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to said State five per centum *thereon as in the case of other sales*, estimating the lands at the value of one dollar and twenty-five cents per acre.

"SEC. 2. *And be it further enacted*, That said Commissioner shall also state an account between the United States and *each of the other States upon the same principles*, and shall allow and pay to each State such amount *as shall thus be found due*, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

In order to get the full force of this section it is desirable to have before us the Alabama act referred to in the first section. It is as follows (10 S. L., 630):

"*Be it enacted* * * * That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama *for the purpose of ascertaining what sum or sums of money are due to said State heretofore unsettled under the sixth section of the act of March 2, 1819*, for the admission of Alabama into the Union, and that he be required *to include in said account the several reservations* under the various treaties with the Chickasaw, Choctaw,

and Creek Indians within the limits of Alabama, and allow and pay to said State five per centum thereon *as in case of other sales.*"

The issue in the case is really upon the proper legal construction of section 2 of the Mississippi act, which was an amendment making the act applicable to other States than Mississippi, and in the construction thereof to ascertain the true meaning of the phrases as therein found of "upon the same principles" and "all lands and permanent reservations."

In order to do this it is most desirable to at one ascertain exactly how this account arises which it is directed shall be stated.

When on April 30, 1802 (2 S. L., 173), Ohio was admitted into the Union it was specifically a part of the compact that in consideration of the continued exemption from taxation of the public lands for a period of five years after their sale the State should be paid five per centum of the net proceeds of their sale, whereof three per centum should be paid directly to the State, and the remaining two per centum should be expended by the United States in building a road leading from the navigable waters flowing into the Atlantic Ocean through the State of Ohio (2 S. L., 173).

Indiana was admitted into the Union April 19, 1816, and in clause 3, of section 6, of the act of admission (3 S. L., 289), it was enacted:

"That five per cent. of the net proceeds of the lands lying within said territory, and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within said State *under the direction of the legislature thereof* and *two-fifths* to the making of a road or roads *leading to* said State *under the direction of Congress.*"

Alabama was admitted into the Union March 2, 1819, and in clause 3, of section 6, of the act of admission (3 S. L., 489), it was enacted:

"That five per cent. of the net proceeds of the lands lying within said territory, and which shall be sold by Congress from and after the first day of September in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which *three-fifths* shall be applied to those objects within said State *under the direction of the legislature* thereof and *two-fifths* to the making of a road or roads *leading to* said State *under the direction of Congress.*"

Mississippi was admitted in 1817 with a similar provision in her act of admission (3 S. L., 348).

Illinois came next, in 1818, with a similar provision in her act of admission (3 S. L., 428), except that the three-fifths were to be applied to educational purposes.

Alabama came in 1819 with the very same provision in her act of admission (3 S. L., 489). So also of Missouri in 1820 (3 S. L., 545).

In its opinion the Court of Claims says (p. 7):

"Subsequent to the admission of Indiana the States of Illinois, Missouri, Alabama, and Mississippi came into the Union, and each State entered into an agreement with regard to the public lands that might be sold within its territory, which was identical in terms with the foregoing statute so far as it relates to the 2-per-cent. fund; and indeed the only variation in the disposition of the 'one-twentieth part' of the proceeds of the public lands was that in the State of Illinois the 3-per-cent. fund was to be applied to the encouragement of learning within the State instead of to the making of roads."

BRIEF.

I have given the dates and references to the statute as to each of the States for the convenience of the court; but it will be noted, and that is the special point of these citations, that there is a general provision giving *for a consideration* to each of these six States one-twentieth, or 5 per cent., of the net proceeds of the sales of the public domain within their respective borders to be applied for their direct benefit and advantage. Three-fifths of this amount was to be expended by them in building roads or canals or for educational purposes within them and the remaining two-fifths to be expended by the General Government in the construction of roads to or through them (as Ohio) respectively. The similarity of the provisions as to each of the six States is so marked and uniform as to indicate unmistakably a plan based upon a fixed policy.

Looking to the observance of its obligation first to Ohio, the United States began the construction of the Cumberland-Gap road, or the National Turnpike, leading from Cumberland, Maryland, through parts of Pennsylvania and Virginia, and through the State of Ohio, and afterwards with Indiana (the same thing in effect) "to Indiana." By subsequent legislation the scheme of this enterprise was extended to go by Springfield to Jefferson City. The delay in the work was so great that it was superseded by the general introduction of steam and the construction of railroads, and the utility and the desirability of what was in its inception a magnificent scheme of internal improvement were entirely destroyed. Perhaps its first real blow was the interposition by President Monroe of his veto to an appropriation to carry on the work in 1822 on the issue of States' rights as against internal improvements. At any rate, it had the misfortune to get into politics. Having become a political issue, it lingered and lan-

guished, and, languishing, died. By an act of Congress in 1835 the portions of it, in a more or less incomplete condition in the States of Pvnnsylvania, Maryland, and Virginia, through which it had been partially constructed, were turned over to the said States respectively, and they were authorized to and did erect toll-gates thereon. This was followed by other acts of Congress surrendering the other portions of the road to the other States with authority to collect tolls.

In 1841 a law was enacted by Congress (5 Stat., 453) the 16th and 17th sections whereof have a material bearing upon the construction to be given the second section of the act of 1857. They relate to Mississippi and to Alabama, and we have observed that section 2 of the act of 1857, on which we rely, is a part of the Mississippi act, and expressly adopts the "same principles." By section 16 of this act of 1841 it was enacted that the two-per-cent. fund of Mississippi, which had been by the General Government since the first day of December, 1817, "*reserved* for the making of a road or roads leading to said State, be, and the same is hereby, *relinquished* to the State of Mississippi, payable in two equal instalments," etc.

By section 17 of the same act it was enacted that the two-per-cent. fund of Alabama, which had been by the General Government since the first day of September, 1819, "*reserved* for the making of a road or roads leading to the said State, be, and the same is hereby, *relinquished* to the said State of Alabama, payable in two equal instalments," etc.

Now, when the act of 1855 was passed providing for a settlement of the account between the United States and the State of Alabama, this section 17 of the act of 1841 was an essential and very important and material factor. It was the very cornerstone and basis of that settlement. The whole of the two per cent. which had been reserved

had also been relinquished, the accrued from September 1, 1819, and the thereafter accruing. This was the very settlement contemplated and provided for. It was the settlement and the only one under the statutes to be had. None other has been suggested or can be pointed out.

As section 2 of the act of 1857 required that the account shall be stated with "each of the other States upon the same principles" as it is required in the first section thereof to be stated with the State of Mississippi, and as that first section provides in terms that the Mississippi account shall be stated "upon the same principles of allowance and settlement as prescribed in the act of 1855 as to Alabama," it is manifest that "the same principles" applicable to the account of "each of the other States" are those made applicable to Alabama under the act of 1855.

It is a fundamental rule of construction that that which is plain needeth not to be construed, and this rule seems to be peculiarly applicable here. What is there that is obscure in the Alabama act of 1855? It is only nine lines in length. It requires an account to be stated by a certain official between the United States and Alabama. About what? For the purpose of ascertaining what sum is due the State heretofore unsettled under section 6 of the act of March 2, 1819 (for her admission), "and that he be required *to include in said account* the several Indian reservations." And that is all there is to it.

An account was to be stated so as to contain matters specifically named, to wit, sums due under section 6 of the act of March 2, 1819. In that account Indian reservations were to be included along with the other matters of account. There is nothing about Indian reservations in section 6 of the act of March 2, 1819.

To say that this act relates only to Indian reservations is offensive to intelligence.

Under section 6 of the act of March 2, 1819, 5 per cent. of the net proceeds of sales of public lands was given Alabama for a good consideration. Three per cent. thereof was to be paid directly to Alabama; 2 per cent. was to be applied by the General Government to building a road or roads to said State. By section 17 of the act of 1841 this 2 per cent. was relinquished to Alabama. These were "the same principles of allowance and settlement" to be applied to Mississippi, and the account was to be settled with "each of the other States" "upon the same principles."

Is there anything obscure there? It is true the Indian reservations were to be "included in said account." If the account was as to them alone what would be "included?"

It is provided also that "all *lands* and permanent reservations" shall be estimated at $1.25 per acre. If only "reservations" were the subject of account then to what does "all lands" refer?

It is wholly immaterial whether we regard the second section of this act of Congress as donating a gratuity, or as making restitution for an unkept compact as the same relates to the duties of the executive officers thereunder. *The statute is mandatory.* The auxiliary used is "shall." Chancellor Kent says that "may" means "must or shall" where "the public or third parties have a claim *de jure* that the power should be exercised." One can not imagine that Congress meant to leave it optional with the Commissioner of the General Land Office to state the account or as to the mode of statement.

In such cases it is only when a hopeless ambiguity is manifest that a judicial construction can be exercised (Sedgewick, 380). It was for Congress, exercising the political power, to decide what restitution should be made to those States for the taxes they had relinquished on public lands for five years after they were sold. If it

be said that Congress was liberal it may well be replied that Congress had a right to be, and the exercise of that power is not to be questioned by mere subordinates of the Executive Department.

In reading this statute these two things should not be overlooked:

1. This statute (section 2) makes restitution for an unkept contract. This section is an amendment offered on the floor of the Senate to the bill of Senator Brown of Mississippi, and, of course, the delegations from Ohio, Indiana, Illinois, and Missouri were not negligent as to their rights as "other States" similarly situated.

2. The act is *mandatory.*

A change in the policy of Congress in connection with the public lands of new States at this period is manifested by a series of acts. Arkansas was admitted in 1836 without the provisions on this subject which we have noted in regard to these six States. In 1835 the national turnpike was turned over to the States in which it was more or less completed with the right to collect tolls thereon; in 1841 the act was passed relinquishing the 2 per cent. to Alabama and Mississippi; in 1855 is the Alabama act to settle accounts; in 1857 comes the Mississippi act, with section 2 providing for the same thing as to "other States," and on February 28, 1859, the Missouri act (11 S. L., 388) was passed giving the assent of Congress to the act of the legislature of that State applying the 2-per-cent. fund to the "completion of certain railroads *in that State.*"

These various acts show a plan and policy on the part of Congress not to saddle the public lands in the new States with an exemption from taxation for *five years after their sale* and to pay back to these States the 2 per cent., which had been reserved on account of this exemption, for their own disposal.

Now, section 2 of the act of 1857 must be read and construed in the light of these statutes on the same subject and this antecedent and contemporaneous jurisprudence:

"The intention of the legislature should absolutely control the action of the judiciary. Where that intention is clearly ascertained the courts have no other duty to perform than to execute the legislative will without any regard to their own views as to the wisdom or justice of the particular enactment.

"The means of ascertaining that intention are to be found in the statute itself, taken as a whole and with all its parts, in statutes on the same subject, antecedent jurisprudence and legislation, contemporaneous and more recent exposition, judicial construction, and usage; and to the use of these means and these alone the judiciary is confined. No other extrinsic facts are in any way to be taken into consideration." (Sedgwick, 379.)

See also Thornley *v.* U. S., 113 U. S., 313.

Statute of Limitations.

The statute is not specifically pleaded, but as in the Court of Claims it constitutes a jurisdictional limitation, it must be regarded omnipresent. In this case the Commissioner of the General Land Office stated an account on December 4, 1872, as found as part of finding of fact No. 2, and a portion of the same was admitted and certified by the Comptroller on January 25, 1873. On February 12, 1873, the Comptroller "set aside and vacated" this certificate. On February 5, 1874, the Comptroller reaffirmed the certificate dated January 25, 1873, as to that part of the claim, making therein the following reservation in express terms, to wit: "*But all questions as to the further claim made by the State are reserved for further consideration.*" And as is found as a fact in the third of the findings of fact, "on 17th of October, 1889, the claimant, by the governor of the State, made a formal demand upon the Commissioner of the General

Land Office to state an account between the United States and the State of Indiana in accordance with the act 3d March, 1857. No further account than that above referred to has been stated by the Commissioner of the General Land Office."

And this suit was brought within the statutory period. The action of the Comptroller of the Treasury left the matter open, and it continued to be pending under the terms of his express reservation of the questions for further consideration, and it was continuously pending in the Treasury Department undecided and not acted upon until the Commissioner failed to state the account upon the demand of the State in October, 1889, whereupon suit was begun.

This is conclusive upon the question of the statute of limitations. But this is a

Trust Fund.

It can not be necessary that to constitute a trust fund money must be "confided to another for a purpose or paid by a third person for the use and benefit of another." That whenever a duty is devolved upon one in relation to any matter or thing for the benefit of another the law will imply a trust is not, I think, stating the rule, which rests upon sound principle, too strongly. By the act of 1857 that branch of the Government which represents its political power enacted a simple law which devolved upon an executive officer a specific duty to be performed in a specific manner for the benefit of the claimant, and I submit that this constitutes a trust.

"Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received or in equity as a trustee for a breach of trust" (citing Scott *v.* Sampson, Willes' Reports, 404).

Kane *v.* Bloodgood, 7 Johns. Ch., 111.

Express trusts may be created by the provisions of a statute as well as by a deed or a will. The New York statute of 1811 provided for the appointment of trustees on the dissolution of corporations to wind them up, and of such Chancellor Kent says:

"They are undoubtedly trustees by means of the powers and duties conferred upon them, and they are not the more so by the use of the term 'trustees.'"

Kane *v.* Bloodgood, 7 Johns. Ch., 129.

The Commissioner of the General Land Office is a trustee under this statute by means of the power and duties conferred upon him by it.

So long as a trust subsists the right of the *cestui que* trust can not be barred by the length of time which he has been out of possession.

Cholmondeley *v.* Clinton, 2 Merivale, 360.

"All the cases admit that no time bars a direct trust between trustee and *cestui que* trust. The settled rule is that so long as the trust subsists the right can not be barred by any length of time during which he has been out of possession.

"There is a class of cases which admit a reasonable time to be a bar, but these are cases in which a party is turned into a trustee by matter of evidence merely and who took possession originally in his own right."

Decouche *v.* Savetier, 3 Johns. Ch., 216.

"Let it be remembered that, though the money was received by Savage as trustee of the plaintiffs in 1818, yet he was never requested to pay it over until 1837, and that then he first became in default for not accounting for it."

Taylor *v.* Benham, 5 How., 276.

In an elaborate opinion of Justice Baldwin (covering more than forty pages) in Boone *v.* Chiler (10 Peters, 223), he considers this question, and says:

"There are some cases in which a constructive trustee is entitled to the same protection of the statute as a direct trustee, who to the plaintiff's knowledge disavows the trust and holds adversely.

"What that reasonable time is in which a constructive trust can be enforced depends upon the circumstances of the case, but there can be but few cases where it can be done after twenty years' peaceable possession by the person who claims in his own right, but whose acts have made him a trustee by implication. His possession entitles him to at least the same protection as that of a direct trustee, who to the plaintiff's knowledge disavows the trust and holds adversely, because his possession is thenceforth adverse."

The terms of the second section are express and mandatory—"shall allow and pay to each State." The claim thereunder was pending in the department until the demand of the State in October, 1889, and it was not until then that the statute was put in operation.

It may be superfluous and unnecessary, but I desire to distinguish here between the trust which I claim exists in this case, and that which was claimed to exist in relation to the use and expenditure of the two-per-cent. fund in Emigrant Company *v.* County of Wright (97 U. S., 339), and Emigrant Company *v.* County of Adams (100 U. S., 61). In those cases the question was not (as in this) whether a trust arose as to the swamp-land fund in the hands of the Government to pay it over to the State under the act of Congress, but whether when it had been paid to the State it was a trust fund in the hands of the State to be specifically applied. This is made clear by what is said by Mr. Justice Bradley on page 67, viz.:

"Our first view was that this trust was so explicit and controlling as to invalidate the scheme finally devised by the legislature of Iowa for the disposal of the land, and under which the contract in question was made. But on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow."

And following this decision, in Hagar *v.* Reclamation District (111 U. S., 701), this court said that the appropriation of the proceeds of the sale of the lands rested in the good faith of the State. All of these cases were reviewed by Mr. Justice Blatchford in his opinion in the second case of United States *v.* Louisiana (127 U. S., 185, *et seq.*), wherein this court held that the proceeds of the swamp-land and two-per-cent. funds were not, as in the hands of the State, such a trust fund as to exempt them from the right of set-off by the Treasury on the debt of Louisiana known as the Indian trust-bonds.

In this case, however, the court explains the ground of the decision which it made in the first Louisiana case, in which the very question I now present arose directly and was expressly decided, as the statute of limitations was specially pleaded and relied upon by the Government. For your convenience, and because it very fully explains this point as made and decided in the first case, I reprint here exactly what you say on this subject on pages 190 and 191, to wit:

"In the case of Louisiana *v.* United States (22 Ct. Cls., 284) the State of Louisiana sued the United States for claims arising under the 5-per-cent. act of 1811 and under the swamp-land acts of 1850 and 1855, and had a judgment for both claims amounting to $71,385.83, which was affirmed by this court in United States *v.* Louisiana (123 U. S., 32). *In that case the United States interposed the defence of the limitation of six years as to the swamp-land claim.* The Court of Claims held that the action of the Commissioner of the General Land Office under section 2 of the act of 1855 in determining, on proof by the agent of the State, that any of the swamp land had, within the meaning of the act, been sold by the United States, so as to bring into force the requirement that the purchase-money should be paid over to the State, was necessary to a right of action for the money on the part of the State, and that as such action in that case did not occur more than six years before the bringing of the suit, the limitation prescribed by section

1069 of the Revised Statates did not apply. A set-off or counter-claim was interposed in that case by the United States, they alleging that the amount due by citizens of the State of Louisiana to the United States for the direct tax levied by the act of August 5, 1861 (12 Stat., 292), was a proper subject of set-off against the claim of the State in the suit. This contention of the United States was overruled by the Court of Claims on the ground that the State had never assumed the payment of the tax assessed under the act of 1861. On the appeal to this court by the United States (123 U. S., 32) it was said in the opinion of the court, delivered by Mr. Justice Field, that the statute of limitations did not seem to have any application to the demand arising upon the swamp-land acts, and that, *as the Commissioner of the General Land Office had not found and certified the amount due to the State from the sales of swamp lands until June 30, 1885*, and the suit was commenced in September, 1886, the limitation of the statute did not apply to the case. It was further held that the State was not liable for the taxes assessed under the act of August 5, 1861, against the real property of private individuals in the State, and that the Court of Claims had jurisdiction of the action. Therefore the judgment was affirmed."

Our cause of action is founded on section 2 of the act of 1857. But when did it accrue? Certainly not then. That section required the Commissioner of the General Land Office "to allow and pay to each State such amount as shall thus be found due." Then there had to be something done, and in the dignified movement of the massive machinery of Government departments it takes a long time to do something. But, as appears by the findings, on January 25, 1873, the commissioner had effected the progress indicated by the ascertainment of amounts. But he could not "pay"—that had really to be done though the treasury machinery. On February 12, his allowance was "set aside and vacated." One year thereafter his allowance was affirmed in part; but the question involved here was therein in express terms re-

served for future consideration, and continued to be reserved until in October,1889, the State made her peremptory demand for compliance with the statute. Now then, if the statute began to run before demand and refusal, when was it put in motion? Did it begin to run when the Commissioner made the allowance, which was set aside and vacated inside of a month? Or did it begin when the Comptroller reserved the question for further consideration? Not if he had the right, as he certainly had the power, to "reserve" for consideration.

It could hardly begin to run while the question was under reservation and the Comptroller was considering. It must have begun when demand was made and action refused. It was then that the action accrued, and the statute begins to run only from the accrual of the right of action.

Jones *v.* Lightfoot, 10 Ala., 17;
Odlin *v.* Greenleaf, 3 N. Y., 270;
Hall *v.* Vandergrift, 3 Binney, 374.

It may not be amiss to bring to your notice that it has been decided that the Commissioner of the General Land Office has by law exclusive jurisdiction in all matters "appertaining to the surveying and sale of the public lands of the United States," and power to "audit and settle all public accounts relating to public lands."

Baldwin *v.* Stark, 107 U. S., 465;
Marquez *v.* Frisbe, 101 U. S., 473;
Shepley *v.* Cowan, 91 U. S., 331.

Wm E. Earles.

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Supreme Court of the United States.

OCTOBER TERM, 1892.

THE STATE OF INDIANA, Appellant,
vs.
THE UNITED STATES.
Term No. 1162.

Appeal from the Court of Claims.

APPENDIX TO APPELLANT'S BRIEF.

The provisions of the second section of the act of 1857 are clearly (and I believe admittedly) applicable alike to Illinois and Indiana. In Illinois the three-fifths of the five per cent. were to be applied to educational purposes instead of to building a road inside the State "under the direction of the Legislature."

In his opinion as to the rights of Illinois under the second section of the act of 1857, Mr. Evarts says as to the principles controlling its interpretation:

I. Upon the act of Congress providing for this account with the State of Illinois, in respect of the sales of the public lands in that State, and the act providing for such an account with the State of Alabama, to which the first-mentioned act refers as a precedent and guide, there is no apparent or natural implication of any other purpose, in the account proposed and required by the act, than the ascertainment of what amount of the net five per cent. of sales (and reservations computed as sale) had not been already paid to the State of Illinois, and the payment of the same.

If we seek to extract from the two acts, and separately express the legislative provision for Illinois, it would read as follows:

"That the Commissioner of the General Land Office be, and he is hereby required to state an account between the United States and the State of Illinois, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and that he be required to include in said account all permanent reservations (at the value of one dollar and twenty-five cents per acre), and to allow and pay to said State five per centum thereon, as is to be allowed and paid in case of the lands sold; and that he allow and pay to said State such amount as shall thus be found due."

Confessedly, then, whoever, in the supposed interest or purpose of the United States, undertakes to impede or defeat this simple yet complete direction of Congress to an executive officer, for the statement and payment of an account of the unsettled net five per centum of sales of the public lands in the State of Illinois must find his warrant for such impediment and defeat elsewhere than in this act of Congress.

But as Congress at the time of passing this act was wholly master of the subject, and competent, presently, wholly to comprehend and provide for the end proposed, by and in the act itself, the necessary construction of the act, according to its own terms and purpose, can be controlled only by its own acceptance or adoption of previous legislation as a continuing part of the legislative disposition of the subject effected by the same act.

So far from the fact that under previous laws of Congress the "account" in question would be stated differently from what the new act (in the construction claimed for it by the State of Illinois) requires, being an argument that the new enactment is to have only the effect of the old, the logical and sensible conclusion is the opposite; new laws are passed to introduce and ordain new rules, and to govern, not be governed by, preceding rules.

In other words, *previous* inconsistent legislation is an argument for, not against, imputing new purposes and new efficacy to the later enactments.

Now, as the previous legislation directed the *payment* to the State of Illinois of but *three* per cent. of the net proceeds, &c., and retained for administration the *two* per

cent., and as the new act was obtained by the efforts of, and for the advantage of, the State of Illinois, it is difficult to find any other substantial or operative effect proposed or accomplished by this new act than the effect claimed in behalf of the State of Illinois, to wit, that the two per cent. should be computed and paid to the State, and no longer remain subject to the previous legislation, which might apply it otherwise.

No intelligent purpose on the part of Illinois in asking, or of Congress in passing this act, can be suggested, but this very efficacy now asked for it.

To satisfy it by its effect upon the few thousand dollars of percentage on *reservations* is wholly inadmissible.

To thwart it by making its direction of payment of the Two Per Cent. Fund to Illinois *subject* to, and not in place of, other dispositions of it, which would absorb it, is to stultify the act.

II. The act, however, making this provision in favor of the State of Illinois, contains a further assurance of certainty in its purpose of requiring the *payment* to the State of the entire net Two Per Cent. Fund, in place of its administration otherwise by Congress in two particulars:

1. By prescribing the settlement with Illinois to be "upon the same principles and allowance" as are prescribed in the "act to settle certain accounts between the United States and the State of Alabama," and "upon the same principles" as in the act itself is prescribed for settlement of account with the State of Mississippi.

2. By, in terms, putting the required payment on account of the "reservations" at *five per cent.* and on the basis that *that* is the measure of the payment on account of lands actually sold.

The effect of these precise and unequivocal measures of the payment to Illinois, by a reference to an indisputable standard, is to exclude every possible or argumentative ambiguity or alternative of meaning.

Judge R. B. Curtis, in his opinion on the same case, says:

That state and condition of the relative rights and obligations of the State and the United States was this: The United States for a valuable and adequate consideration, had agreed to expend two per cent. of the receipts of the sales of public lands within the State of Illinois, "in making roads leading to the State."

The United States had begun to execute the trust. It had built roads in Ohio and Indiana. But from a change in the public policy of Congress, instead of allowing those roads, when built, to remain free and open for public use, the United States transferred them to Ohio and Indiana, as the several property of each of those States, with power to impose tolls for their use.

I can not think this was a fair and full compliance, or, indeed, any compliance at all, with the contract and the trust under which the United States received these moneys. Under the contract, certain moneys, in which the State of Illinois must be deemed to have had an interest, were reserved to build roads leading to that State. Nothing is said, and certainly nothing can be implied, leading to the conclusion that, when built, they could not be used freely and without charge. The United States reserve no right to themselves to impose a toll for the use of the roads so built out of the moneys which Illinois agrees, for a valuable consideration, should be appropriated to build them. Still less do the United States reserve any right to convey the roads to Ohio and Indiana, and enable those States to control, manage, discontinue, and levy tolls on such roads. And when this was done, in my judgment, the United States abandoned the contract, and finally and decisively refused to execute the trust.

Such seems to me to have been the state of facts and the relations of the State of Illinois to the United States when the act of March 3, 1857, "An act to settle certain accounts between the United States and the State of Mississippi and other States," was passed.

The State of Illinois *then had a just claim* on the United States, capable of liquidation in the Land Office, founded on the fact that the United States had agreed, for an adequate and valuable consideration, to appropriate two

per cent. of the receipts from the sale of public lands sold within the State, to make roads leading to the State, and had not performed this contract.

Now, concerning the act of March 3, 1857, there are certain things indubitably true:

First. That it relates to the state of the account between the United States and the several States, arising out of the sales of public lands within such several States.

Second. That it assumes that this account arises out of the stipulations made by the United States in respect to the reservation of five per cent., for the benefit of such States, from the proceeds of the sales of public lands within such States.

Third. That it commands the Commissioner of the General Land Office to state such an account.

Thus far is clear.

The doubts which arise are—

First. Whether this legislation had any other scope or effect than this: To direct the Commissioner, in stating an account, to include Indian and other reservations.

Second. Whether the Commissioner, in stating the account required by this law, should go into the inquiry how far the United States had executed its trust as respected the two per cent., by "making roads leading to the States," and should pass on that general question, and, in some way, arrive at its results.

Upon the first of these questions I find myself unable to entertain any doubt. The act in question, by its first section, requires an account to be stated between the State of Mississippi and the United States, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State; and it directs and requires that in stating that account the Commissioner of the General Land Office who is commanded to state the same, shall include certain described items.

I am unable to perceive why the whole of this mandate of the legislature should not be obeyed. And, if the whole is to be obeyed, then there must be, first, an account stated of the sum or sums of money due to the State. Second. There must be included therein the items designated.

To state an account of the items specially required to be included therein, would not approach so near to compliance with the act as to state an account of the sums of money due to the State without including these special allowances. The latter would obey the general order of Congress and disregard one of its details. The former would disregard the general order to state an account, and substitute in its place obedience to a special direction as to particular items to be included therein.

It is every-day's practice for courts to order an account to be taken covering a particular subject-matter, and to direct that certain items shall be included in the account. I never supposed any one could believe that such an order would be complied with by taking an account of the items specially directed to be included in the account.

If the sole object of Congress had been to allow to the State of Mississippi and each of the other States two per cent. on a fixed valuation of one dollar and a quarter on the lands reserved from sale, why was not this, and this alone, said by Congress? Why should an account have been directed of the sum or sums of money due to the State on account, not of these reservations, but "of the public lands in the said State?" The question being whether the account is to be restricted to "reservations," or is to include all sales of public lands, how is it possible to escape from the express words of the act that the account is to be of what is due "on account of the public lands in said State," and that the reservations are to be "included" as one of its items.

If this is true as between the State of Mississippi and the United States, it is equally true as between the State of Illinois and the United States, by force of the second section of the act of March 3, 1857, which applies "the same principles" to each of the other States.

Wm E. Earle.

148 U.S. 148

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In the Supreme Court of the United States.

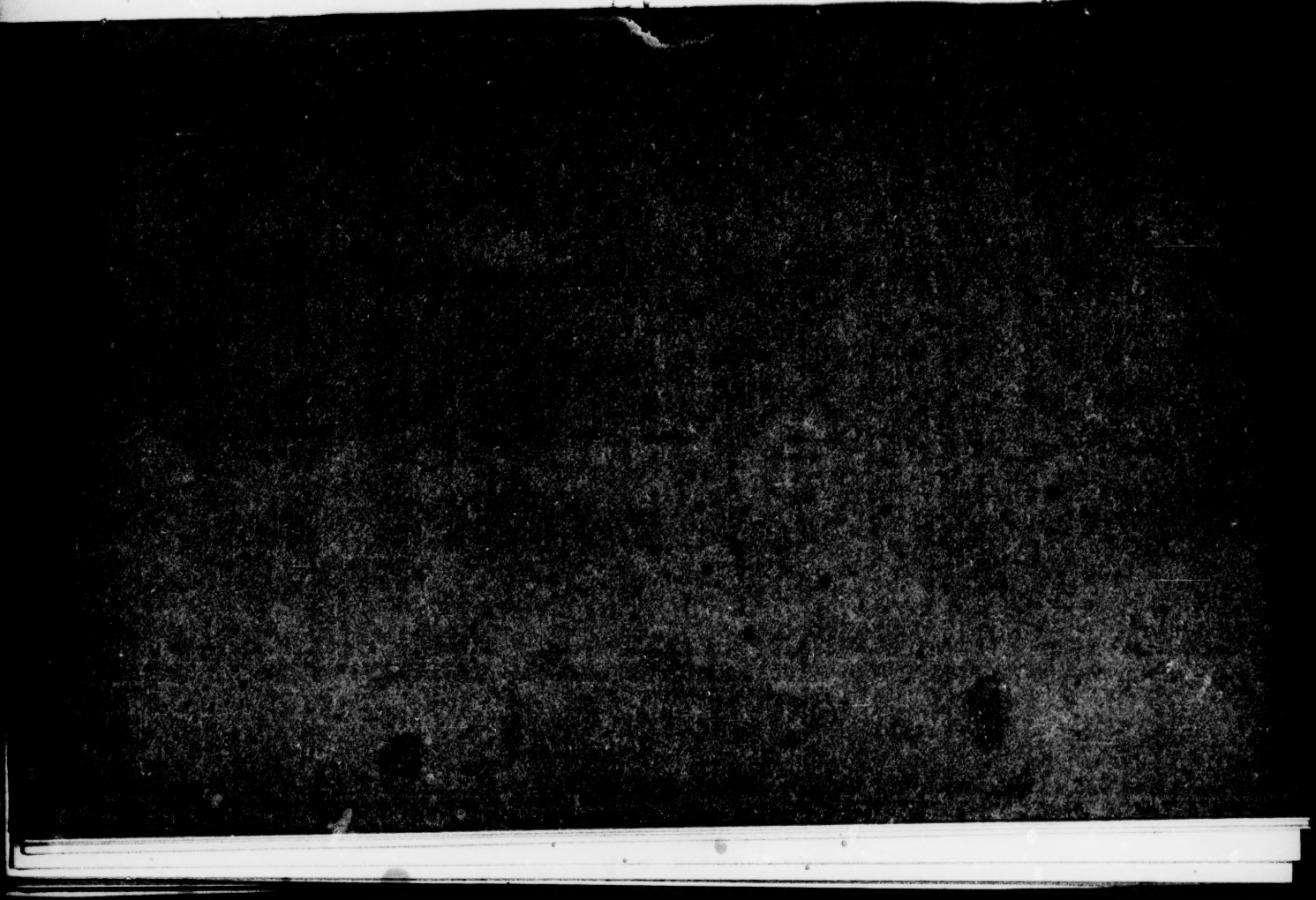
OCTOBER TERM, 1892.

THE STATE OF INDIANA, APPELLANT,
vs.
THE UNITED STATES.
} No. 1162.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

A. X. PARKER,
Assistant Attorney-General.



In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE STATE OF INDIANA, APPELLANT,
vs.
THE UNITED STATES.
No. 1162.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is one of a series arising by way of suits brought against the United States by several States, respectively, to obtain 5 per cent of the net proceeds of lands located within the several States sold by the United States after the passage of acts under which such States were admitted into the Union.

The States interested in the claims referred to are Ohio, Illinois, and Indiana.

The claims involved were for a long period before Congress, but were not there determined.

In 1873 Mr. Senator Pratt, from Indiana, stated in the Senate that these States had then been diligently prosecuting these claims for fifteen years. (Globe, 42d Cong., 3d Sess., Part 2, p. 1476.)

Mr. Senator Logan then stated (p. 1475), upon the authority of the Comptroller, the three several claims, as follows:

> The claim of the different States is: for Illinois, $474,119.69; for Indiana, $413,568.61; for Ohio, $399,400.92; the whole claim amounting to $1,287,088.82.

In the same debate, Mr. Senator Conkling said in reference to the question involved (p. 1476):

> I believe that I may say that this is a question of law; it is a question of history; it is a question compounded of many ingredients; it has been the subject of elaborate reports, and so diversified and complicated is it that unquestionably a discussion will take place; and I think * * * when the discussion begins nobody who is upon this earth can foresee the probable termination of it.

The case of the *State of Indiana* vs. *The United States* comes up from the Court of Claims, where the petition initiating the action was filed October 23, 1889 (pp. 1 to 4).

The suit was decided against the claimant November 19, 1891 (findings, pp. 5 to 9), and the petition was dismissed (p. 9). Judgment of dismissal appears (p. 26).

The opinion in the case, delivered by Mott, J., was filed June 30, 1892, and elaborately discusses all matters involved (pp. 9 to 26).

By the petition the claimant asks judgment for $412,-184.97.

NATIONAL LEGISLATION.

The following statutes bear more or less directly upon the questions now under investigation.

By the act of April 30, 1802 (2 Stat. L., 173), provision was made for the admission of the STATE OF OHIO into the Union "on an equal footing with the original States."

By section 7 three propositions were submitted to the people for acceptance or rejection. The first provided lands for the use of schools, the second related to salt springs, and the third provided—

> That one-twentieth part of the net proceeds of the lands lying within the said State sold by Congress, from and after the thirtieth day of June next, after deducting all expenses incident to the same, shall be applied to the laying out and making of public roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass: *Provided always*, That the three foregoing propositions herein offered are on the conditions that the convention of said State shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth of June next, shall be and remain exempt from any tax laid by order or under authority

of the State, whether for State, county, township, or other purpose whatever, for the term of five years from and after the day of sale.

The act of March 29, 1806 (2 Stat. L., 357), is the original enactment providing for the construction of the CUMBERLAND ROAD.

By section 1 the President was authorized to appoint commissioners to lay out a road from Cumberland, or a point near there, to the Ohio River. By section 6, $30,000 is appropriated to defray the expense of laying out and making the road. This section concludes as follows:

> Which sum of thirty thousand dollars shall be paid, first, out of the fund of two per cent reserved for laying out and making roads to the State of Ohio by virtue of the seventh section of an act passed on the thirtieth day of April, one thousand eight hundred and two, entitled "An act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States, and for other purposes," three per cent of the appropriation contained in said seventh section being directed by a subsequent law to the laying out, opening, and making roads within the said State of Ohio; and, secondly, out of any money in the Treasury not otherwise appropriated, chargeable upon, and reimbursable at the Treasury by said fund of two per cent as the same shall accrue.

By the *Act of March* 3, 1811 (2 Stat. L., 661), the sum of $50,000 is appropriated to be expended in making the Cumberland Road between Cumberland and Brownsville,

Pa. It is directed that this sum shall be replaced out of the fund reserved by virtue of the seventh section of the act of April 30, 1802, before referred to.

By *Act of May* 6, 1812 (2 Stat. L., 730), an additional appropriation of $30,000 is made, to be expended upon the Cumberland Road, the same to be paid out of the fund reserved by said section 7 of the act of 1802. Further similar appropriations are made by statutes set forth. (3 Stat. L., 206, and *Id.*, 282.)

On the 19th of April, 1816, Congress passed an act for the formation and admission of the STATE OF INDIANA. (3 Stat. L., 289.) By section 6 five propositions are submitted to the people of the State; the first and fourth relate to school lands, the second to salt springs, and the fifth to lands for the seat of the State government. The third proposition is as follows:

> Third. That five per cent of the net proceeds of the lands lying within the said territory and which shall be sold by Congress from and after the first day of December next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three-fifths shall be applied to those objects within the said State, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State under the direction of Congress.

The concluding paragraph of this act is as follows:

> *And provided always*, That the five foregoing provisions, herein offered, are on the conditions that the convention of the said State shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by the

> United States, from and after the first day of December next, shall be and remain exempt from any tax laid by order or under any authority of the State, whether for State, county, or township, or any other purpose whatever, for the term of five years from and after the day of sale.

The State was admitted December 11, 1816, by resolution. (3 Stat., 399.)

The *act of April* 11, 1818 (3 Stat. L., 424), directs the Secretary of the Treasury to pay 3 per cent of the net proceeds of the land of the United States lying in the State of Indiana, sold after December 1, 1816, or hereafter to be sold, to such person or persons as may be authorized by the legislature of said State to receive the same; which sums shall be applied to making public roads and canals within the State, in conformity with the act of April 19, 1816, and to no other purpose whatever.

On April, 1818, an act was passed providing for the admission of ILLINOIS as a State. (3 Stat. L., 428.)

The third subdivision of section 6 is as follows:

> Third. That five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress, from and after the first day of January, one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university.

And the proviso attached is as follows:

> *Provided always*, That the four foregoing propositions herein offered are on the conditions that the convention of the said State shall provide, by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States from and after the first day of January, one thousand eight hundred and nineteen, shall remain exempt from any tax laid by order or under any authority of the State, whether for State, county, or township, or any other purpose whatever, for the term of five years from and after the day of sale.

It is understood that the organizing acts relating to the States of Mississippi (1817) and Missouri (1820) contained provisions similar in substance and effect.

The act for the admission of Alabama was passed March 2, 1819. (3 Stat. L., 489.) The third subdivision of section 6 of this act provides—

> That five per cent. of the net proceeds of the lands lying within the said territory, and which shall be sold by Congress, from and after the first day of September, in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which three-fifths shall be applied to those objects within the said State, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress.

This act also provides for the exemption of lands sold, for five years after the sale, from State or local taxation.

May 15, 1820 (3 Stat. L., 604), an act was passed authorizing the President to appoint commissioners to examine the country between Wheeling, Va., and a point on the left bank of the Mississippi River between St. Louis and the mouth of the Illinois, and to lay out a road between these points. The commissioners were empowered to employ surveyors and assistants and to lay out a road 80 feet wide and to take lands of the United States therefor. The following provision appears in section 2:

> *Provided always, and it is hereby enacted and declared*, That nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the United States to make or to defray the expense of making the road hereby authorized to be laid out, or of any part thereof.

The *Act of March* 3, 1825 (4 Stat. L., 128), appropriates $150,000 for opening and making a road from Canton, Ohio, to Zanesville, and directs the money to be replaced out of the fund reserved by the several acts admitting the States of Ohio, Indiana, Illinois, and Missouri into the Union.

By section 4 of this act it is provided that the National Road shall pass by the seat of government of the States of Ohio, Indiana, and Illinois. The *Act of March* 2, 1827 (4 Stat., L. 228) makes provision for the repair of the road. The *Act of March* 2, 1829 (4 Stat. L., 451), appropriates $100,000—

> For the purpose of opening and making the Cumberland road westwardly from Zanesville, in the State of Ohio; which said sum of one hundred

> thousand dollars shall be replaced out of the fund reserved for laying out and making roads, under the direction of Congress, by the several acts passed for the admission of the States of Ohio, Indiana, Illinois, and Missouri. * * *

On the same day (*ibid.*) Congress passed an act directing that the road located through the State of Indiana under the act of May 15, 1820, and the act of March 3, 1825, shall be opened 80 feet wide, commencing at Indianapolis and working to the eastern and western boundaries of the State. The sum of $50,000 is appropriated for the work, and the money is directed to be replaced out of the fund reserved by the admitting acts of the four States before mentioned.

The act of March 3, 1829, provides for repairing the Cumberland road east of Wheeling. (4 Stat. L., 363.)

The *Act of May* 31, 1830 (4 Stat. L., 427), appropriates $100,000 for work on the Cumberland road west of Zanesville, and $60,000—

> For the purpose of opening, grading, and bridging the Cumberland road in the State of Indiana, commencing at Indianapolis, and progressing with the work to the eastern and western boundaries of the said State.

The moneys are to be replaced from the fund reserved under the acts admitting the four States before specified.

The *Act of March* 2, 1831 (4 Stat. L., 469), appropriates $100,000 for constructing the "Cumberland road westwardly of Zanesville," and also appropriates to pay for work "heretofore done on the Cumberland road east of Zanesville, in the State of Ohio." The sum of $75,000 is

appropriated "for the purpose of opening, grading, and bridging the Cumberland road, in the State of Indiana, including a bridge over White River, near Indianapolis, and progressing with the work to the eastern and western boundaries of the State." Appropriation is also made in this act "for the purpose of opening, grading, and bridging the Cumberland road, in the State of Illinois." The sums appropriated are to be replaced out of the fund reserved under the acts of admission of the four several States before named.

By the *Act of March* 2, 1831 (4 Stat. L., 483), the United States consents to the erection of tollgates upon the National Road in the State of Ohio in accordance with the act of the general assembly of that State.

Similar authority is given to the State of Virginia by the *Act of March* 2, 1833. (4 Stat. L., 655.) By the *Act of June* 24, 1834 (4 Stat. L., 680), an appropriation of $200,000, is made for continuing the Cumberland road, in the State of Ohio, and $150,000 for continuing the same in the State of Indiana, and $100,000 for continuing the same in the State of Illinois, the moneys to be replaced out of the fund reserved under the several acts admitting the States of Ohio, Indiana, and Illinois. Section 3 of this act provides that "for the entire completion of repairs of the Cumberland road, east of the Ohio River, and other needful improvements on the said road" (under the several acts cited), the sum of $300,000 is appropriated. Section 4 of this act is as follows:

> *And be it further enacted*, That as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of said road,

> agreeably to the provisions of this act, the same shall be surrendered to the States, respectively, through which said road passes, and the United States shall not thereafter be subject to any expense for repairing said road.

By the *act of March* 3, 1835 (4 Stat. L., 772) $200,000 is appropriated for the purpose of continuing the Cumberland road in the State of Ohio and $100,000 for continuing the same in the State of Indiana, and these moneys are directed to be replaced out of the funds reserved under the acts admitting the States of Ohio, Indiana, and Illinois into the Union.

By the *act of July* 2, 1836 (5 Stat. L., 71), further appropriation is made for continuing the Cumberland road in the States of Ohio, Indiana, and Illinois, the moneys to be replaced from the fund reserved under the acts admitting the states of Ohio, Indiana, Illinois, and Missouri. It is also directed that the moneys appropriated for the road in the States of Ohio and Indiana be expended in completing the greatest possible continuous portion of the said road in the said States so that the finished parts thereof may be surrendered to the said States respectively.

By the *act of March* 3, 1837 (5 Stat. L., 195), further appropriations are made for the construction and the repair of the Cumberland Road.

By section 4 the sums appropriated in the States of Ohio, Indiana, and Illinois are directed to be—

> Replaced by said States, respectively, out of the fund reserved to each for laying out and making roads under the direction of Congress, by the several acts passed for the admission of the said States into the Union.

Further appropriations were made May 25, 1838 (5 Stat. L., 228).

By the *act of September* 4, 1841 (5 Stat. L., 453), provision is made to pay to nine States named, including Indiana—

> Over and above what each of the said States is entitled to by the terms of the compacts entered into between them and the United States upon their admission into the Union, the sum of 10 per centum upon the net proceeds of the sales of the public lands which, subsequent to the day aforesaid, shall be made within the limits of each of said States, respectively: *Provided*, That the sum so allowed to the said States, respectively, shall be in no wise affected or diminished on account of any sums which have been heretofore, or shall be hereafter, applied to the construction or continuance of the Cumberland road, but that the disbursements for the said road shall remain, as heretofore, chargeable on the 2 per centum fund provided for by compacts with several of the said States.

Sections 16 and 17 of said acts are as follows:

> SEC. 16. *And be it further enacted*, That the two per cent. of the net proceeds of the land sold, or that may hereafter be sold, by the United States in the State of Mississippi since the first day of December, eighteen hundred and seventeen, and by the act entitled "An act to enable the people of the western part of the Mississippi territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," and all acts supplemental thereto, reserved for the making of a road or roads leading to said State, be, and the same is hereby, relinquished to the State of Mississippi, payable in two equal in-

stallments, the first to be paid on the first of May, eighteen hundred and forty-two, and the other on the first of May, eighteen hundred and forty-three, so far as the same may then have accrued, and quarterly, as the same may accrue, after said period: *Provided*, That the legislature of said State shall first pass an act declaring their acceptance of said relinquishment in full of said fund, accrued and accruing, and also embracing a provision, to be unalterable without the consent of Congress, that the whole of said two per cent fund shall be faithfully applied to the construction of a railroad leading from Brandon, in the State of Mississippi, to the eastern boundary of said State, in the direction, as near as may be, of the towns of Selma, Cahaba, and Montgomery, in the State of Alabama.

SEC. 17. *And be it further enacted*, That the two per cent of the net proceeds of the lands sold by the United States in the State of Alabama since the first day of September, eighteen hundred and nineteen, and reserved by the act entitled "An act to enable the people of the Alabama Territory to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States, "for the making of a road or roads leading to the said State, be, and the same is hereby, relinquished to the said State of Alabama, payable in two equal installments, the first to be paid on the first day of May, eighteen hundred and forty-two, and the other on the first day of May, eighteen hundred and forty-three, so far as the same may then have accrued, and quarterly as the same may thereafter accrue: *Provided*, That the legislature of said State shall first pass an act declaring their acceptance of said relinquishment, and also embracing a provision, to be unalterable without the consent of Con-

> gress, that the whole of said two per cent fund shall be faithfully applied, under the direction of the legislature of Alabama, to the connection, by some means of internal improvement, of the navigable waters of the bay of Mobile with the Tennessee River, and to the construction of a continuous line of internal improvements from a point on the Chattahoochee River, opposite West Point, in Georgia, across the State of Alabama, in a direction to Jackson, in the State of Mississippi.

By the *Act of August* 11, 1848 (9 Stat. L., 283), so much of the Cumberland road as lies within the State of Indiana, with all property belonging to the United States connected therewith, is transferred and surrendered to the State.

The *Act of January* 20, 1853 (10 Stat. L., 152), makes a similar transfer and surrender to the State of Ohio. The *Act of May* 9, 1856 (11 Stat. L., 7), makes a similar transfer to the State of Illinois.

March 2, 1855 (10 Stat. L., 630), the following act to settle the accounts between the United States and the State of Alabama was passed:

> That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, under the sixth section of the act of March second, eighteen hundred and nineteen, for the admission of Alabama into the Union; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to the said State five per centum thereon, as in case of other sales.

The *Act of March* 3, 1857 (11 Stat. L., 200), provides for the settlement of certain accounts between the United States and the State of Mississippi and other States. The act provides:

> That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the "Act to settle certain accounts between the United States and the State of Alabama," approved the second March, eighteen hundred and fifty-six; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State five per centum thereon, as in the case of other sales, estimating the lands at the value of one dollar and twenty-five cents per acre.
>
> SEC. 2. *And be it further enacted*, That the said Commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre.

POINTS.

The findings of fact by the Court of Claims, with the statements of account included, present the case so clearly, and the opinion delivered is so full and painstaking, that an argument by brief of counsel in support of the decision can add little of value.

I.

THE POSITION OCCUPIED BY THE APPELLANT.

The claimant asks judgment for $412,184.97.

It is not shown that the nation has ever received or had any moneys that belonged to the State. It is not shown that the General Government has ever agreed or promised to pay this sum or any part thereof to the State; it does not appear that the State has ever, with or without request, paid out this money or any part of it for the use or benefit of the General Government.

The theory of the petitioner is understood to be that upon becoming a State the United States, with a view of selling its unoccupied lands, favored the construction of a wagon road, which should become a great highway leading from navigable waters emptying into the Atlantic to the eastern boundary of the State, and also through the State; and that the General Government set apart one-twentieth of the net proceeds of the lands lying within the State which should be sold after December 1, 1816, for the construction of such road or roads.

That the setting off of this 5 per cent of such net proceeds was upon condition that the State should provide that all lands so sold by the United States should be and remain free of and from State and local taxation for five years after the sale, and that the State performed the condition.

These statements cover the principal points of the asserted offer and acceptance. It is true that it is claimed on behalf of the State that the United States was impliedly

bound to build a road from tide or eastern navigable waters to and through the State and also that the nation was also bound to construct the road throughout its whole extent in expenditure, solidity, and completeness equal to that of the Cumberland road from Cumberland westward; and that the General Government was bound to hold in its own control and to maintain and to keep in repair said road as a free highway throughout its whole length, for an unlimited period of time, if not perpetually.

But it can hardly be contended that these last stated claims are based upon any specific agreements, but rather they rest upon inferences drawn and conclusions assumed.

The whole 5 per cent fund was long since paid out and expended and applied upon and towards the building of the road.

Therefore to allege trusteeship is to allege the custody of and responsibility for a spent fund that has no existence.

Instead of claiming damages for failure to complete and maintain such a road as the State assumes it was to have in return for its agreements not to tax sold lands for five years, it concludes that there is a fund and that the State owns it, and that the United States upon becoming unable to complete and maintain the road with the fund dedicated to that purpose, thereupon became charged with the whole 5 per cent fund as trustee for the State and became liable upon demand, and not until demand, to pay over the total fund to the State or be subjected to a judgment therefor.

The position of claimant seems to be, in effect, that the United States, in consideration of the State's witholding

of the taxation for five years, guaranteed, absolutely, the full and perfect road that should actually run from navigable waters of the Atlantic to at least the western boundary of the State, and that upon failure to complete and maintain such a road, although it had expended all the fund and much money besides in constructing a road that was actually used over its whole length, from Cumberland to Illinois and beyond, the State became at once the owner of the amount of the fund, as though it existed, and the United States became a trustee thereof as though the State owned it and as though it had not been paid out.

Not only this, but, further, the State claims that the United States, by reason of constructively holding after 1857 money that never belonged to the State and that had long since been paid out as the parties had intended, as a trustee for the State, remained liable to pay a sum equal to the fund without regard to the lapse of time or to the statute of limitations, until formal demand was made October, 1889.

II.

THE TOTAL OF THE FIVE PER CENT FUND OF THE STATE OF INDIANA HAS BEEN EXPENDED BY THE UNITED STATES UPON THE ROAD IN QUESTION.

The account stated in 1872 (Rec., pp. 5, 6) shows that from December 1, 1816, to December 31, 1856, the 2 per cent on net proceeds on sales of the lands amounted to $413,568.61. Since January 1, 1857, no net proceeds have come into existence.

The 3 per cent fund had all been turned over to the State, except $47.12, which remained due the State from 1856 to 1873.

The Indian reservation account, as stated, showed due the State the sum of $6,333.73.

The amount of the two smaller items, $6,380.85, was paid to the State in 1873, all questions as to a further claim being reserved. (9.)

Exhibit D (pp. 7, 8) shows that the amount appropriated by the United States for laying out and making the road referred to, the same to be replaced out of the 2 per cent fund reserved by the admitting acts to the three States of Ohio, Indiana, and Illinois, was $2,502,900.45; and that similar appropriations to be replaced out of the corresponding fund reserved to the four States of Ohio, Indiana, Illinois, and Missouri, was $1,555,000; making a total expenditure of $4,057,900.45. Its pro rata share of the two constituent factors of said amount is to be charged against the 2 per cent fund of the State of Indiana.

The account stated, which is included in the findings of fact, says (p. 7) that by statement D it will be seen—

> That the pro rata of the sums from time to time appropriated for the construction of the Cumberland road, which by law were to be replaced in the Treasury out of the 5 per cent accruing to Ohio, Indiana, Illinois, and Missouri, would more than absorb the entire amount of the 2 per cent which has accrued upon the sales of lands in Indiana. Hence, in the absence of special legislation authorizing the 2 per cent to be paid over, there would appear to be at present nothing payable to Indiana except $47.12, the balance due her 31st December, 1856, on the 3

per cent account, and $6,333.73, being the 5 per cent on $126,674.52, the cash value at $1.25 per acre of 101,339.62 acres of land within the limits of the State embraced by permanent Indian reservations.

It is therefore established by the findings, and is part of the case for all purposes, that more than the total of the "5 per cent of the net proceeds of the sold lands lying within said territory" which became the State of Indiana was paid, laid out, and expended in laying out and constructing the National Road designated in many statutes and referred to in the petition in this suit, and also that no 2 per cent fund remains.

III.

THE UNITED STATES PERFORMED ITS FULL DUTY TO THE STATE IN RELATION TO THE ROAD.

The Ohio act was passed almost fourteen years earlier than that of Indiana; the legislation initiating the Cumberland Road project was enacted nearly ten years previous to the admission of Indiana.

By the Ohio act the twentieth part of the net proceeds is to be applied to roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same.

By a subsequent law three-fifths of this money is directed to be used upon roads within the State of Ohio.

By the Indiana act the 5 per cent is to be reserved for making "*public roads and canals*, three-fifths to be applied to those objects within the State under the direction of the legislature thereof, and two-fifths to the making of

a road or roads leading to the said State under the direction of Congress." The Cumberland Road act appropriates $30,000, and directs that it "shall be paid, first, out of the fund of 2 per cent reserved for laying out and making roads to the State of Ohio," etc.

IV.

THE ARGUMENT BASED ON GRANTS TO OTHER STATES IS NOT WELL FOUNDED.

The claim made by appellant, that it is entitled to the amount of the 5 per cent fund because the grant of such a percentage to several States for divers uses shows an intent to turn over to each State coming into the Union this percentage of the net proceeds of the public domain within it, is not founded, because the United States has already, in the making of this road, and in the turning over of the 3 per cent to the State, already given the claimant the full benefit of its 5 per cent.

In view of the new phraseology employed in the Indiana act, it can not be reasonably claimed that any rights attach to the State of Indiana by reason of any failure of the eastern terminus of the road to reach the navigable waters vaguely referred to in the Ohio act.

There is no ground for a claim that Congress might not use good judgment and economy in the methods of constructing and completing the road to the State, although the cost and completeness of the structure was reduced west of the Ohio River. The mere minor matter of refraining from State and local taxation was not of such im-

posing consequence as to require embarrassment of the country by holding to an expensive and extravagant style of construction of a wagon road from Cumberland to Jefferson City. Nor was such refraining sufficient to compel the United States to hold the road in seven States and maintain it perpetually through a rapidly growing country without the privilege of tolling or of transfer.

The transference of the management of the road to the States when the Presidential veto enforced the doctrine that the nation could not collect tolls within the States for the using of highways it had built there was simply a means of providing for the maintenance, repair, and protection of the highway, and the road remained none the less a public road after such transfer.

It does not lie with the appellant to say that the road was not, in fact, practically completed, because the first finding of fact (p. 5) says that the road was completed from Cumberland to Wheeling, and that it was graded, bridged, and made a highway from opposite that city to its western terminus, "and upon it was transported the Government mail, and it was open to and used by the public."

Therefore not only did the United States expend upon the road more money than the 2 per cent funds furnished, but it constructed a highway from its eastern portion, as that existed when Indiana was admitted, to the contemplated western terminus, Jefferson City.

The appellant is now precluded from contending that the road was never made.

V.

THE ACT OF 1841 HAS NO BEARING UPON THE CASE OF THE STATE OF INDIANA.

It is true that the act of 1841 (*supra*) shows an increasing liberality in making gifts to the States.

In fact one object of the law appears to be a division of funds among the States. Section 1 speaks of the arrangements between the nation and the several States in relation to the 2 per cent fund as compacts; but the same proviso reserves these arrangements from being affected by the gifts made by this act.

Section 16 transfers to the State of Mississippi the two per cent fund arising for that State, but the legislature is required to pledge its application to the construction of a specified railroad.

This act recognizes the changes taking place from the development of the country and the introduction of steam in land carriage, but it neither makes nor points out any change in the relations between the United States and the State.

The same comment is applicable to the provision in favor of the State of Alabama contained in section 17 of said act of 1841.

VI.

THE ACT OF 1855 IS WITHOUT EFFECT IN DETERMINING THE CASE OF INDIANA.

The *act of* 1855, *supra* (10 Stat. L., 630), relates to Alabama only and is simply another reaching out for the paternal funds of the National Government.

As the sales of land in that State were found to remain limited by reason of large amounts of territory held in reservation for the use of Indians, it is directed that, for the purposes of the 5 per cent fund of the State of Alabama, the several reservations shall be treated as sold lands.

The statement of the account provided for furnishes a convenient method of procedure for reaching the fund and for declaring the amount thereof, and the commissioner is directed to allow and pay the same.

This is the full purpose and scope of the act.

VII.

THE ACT OF 1857 FAILS TO SUPPORT APPELLANT'S CONTENTION.

The *act of March* 3, 1857, *supra* (11 Stat. L., 200) seems to be the main reliance of the appellant in sustaining its contention.

As shown by the opinion delivered by the Court of Claims, this reliance is not well placed.

This act comprises two sections.

Section 1 relates to the State of Mississippi and is, in purpose, substance, method, and effect, precisely the same as the act of 1855 above considered, except the change of the State affected thereby. The account is to be stated and the percentage arising from reservation lands is to be added, and the commissioner is to allow and pay the same.

Section 2 consists of five lines and has no relation to Mississippi.

It follows the precedent of the act of 1855 and of section 1 of the act of 1857, by requiring the Commissioner of the Land Office to state an account.

The object here, as in the preceding enactments, is to reach the percentage upon the lands held in reservation for the Indians.

The "principles," or principle, involved in the act of 1855 are, or is, nothing more and nothing less than the obtaining by the State of 5 per cent upon the reservation lands, treating them as lands sold by the Government at $1.25 per acre.

Section 1 of the act of 1857 directs the ascertaining of the amount due the State of Mississippi on account of public lands in said State "upon the same principles of allowance and settlement" as prescribed in the act of 1855, which, of necessity, limits the "principles" and scope to the obtaining of 5 per cent. upon the Indian lands.

Section 2 extends the scope of the procedure without changing its nature or purpose and directs that the Commissioner shall state "an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at $1.25 per acre."

VIII.

CONCLUSION UPON THE ACTS OF 1841, 1855, AND 1857.

The appellant assumes that the United States violated its compact with the State, upon the grounds discussed in

preceding points, and that Congress recognized its obligation to take action in the interest of the injured State and others similarly situated; that in consequence it enacted the laws of 1855 and 1857, and that the act of 1841 entered into and became a part of the act of 1857; that an express trust resulted, and the United States became the trustee and the State became the *cestui que trust*; that the State of Indiana is, consequently, entitled to receive from this trustee $412,184.97, the full amount of the 5 per cent net proceeds, and that this sum became due to the State so as to set the statute of limitations running in (and not before) 1889, when demand was made by Governor Hovey.

A faithful analysis, accurate and just, of the acts of 1841, 1855, and 1857 must convince the free judgment, it is respectfully submitted, that the attempt and effort of the appellant to found and establish its claim upon these enactments fails utterly.

IX.

THE ACT OF 1857 HAS NO RELATION TO THE ACT OF 1841.

(*a*) The appellee directly antagonizes the claim set forth on behalf of the appellant, that the act of 1857 relates in any manner to the act of 1841.

The act of 1855 makes no reference to the act of 1841, and neither directly or obscurely, in terms or by construction, includes anything provided for by section 17 of the act of 1841. There is no inclusion in the act of 1855 relating to Alabama, of any "same principles," or any principles of the act passed fourteen years previously.

Section 1 of the act of 1857 applies the "same principles" of the act of 1855 to the statement of the account of Mississippi, and section 2 applies these "same principles" to the accounts of the other States.

It is true that the act of 1841 relinquishes to the States of Alabama and Mississippi the then existing funds arising from the sales of the public domain lying within these States. Sections 16 and 17 *relinquish existing reserved funds;* they do not make grants from the public Treasury.

The stating of the accounts under the acts of 1855 and 1857 is not affected by the sections of the act of 1841. A debit and credit account was not called for, but an account stated by the officer of the Government in such a manner as to show any moneys remaining due, and unsettled, under the specified sections of the admitting acts.

The admitting act, and no other is referred to in the act of 1855. The act of 1857 relates back to that of 1855 and to that only. The "principles" of the account involved are the amounts of net proceeds arising from the sales of the lands, the amounts settled, and the percentages thereon, or paid over to the States, the amounts to be added, on account of counting the Indian reservations as lands sold at $1.25 per acre, and a setting forth of the resulting balance. The balance was to be allowed and paid to the State.

The result was precisely the same whether the 5 *per cent moneys, the moneys "reserved" by the admitting acts, had been or had not been "relinquished" in* 1841.

(*b*) Counsel for appellant says (Brief, p. 7, foot), referring to some act not very clearly designated, that:

"To say that this act relates only to Indian reservations is offensive to intelligence."

It is true that the acts of 1855 and 1857 related to something besides the Indian reservations. They required statements of account sufficient to show sums payable to the States under the admitting acts and not theretofore settled.

Moneys not then due the States, and moneys that had been settled, or settled for, were not included. Accounts theretofore settled were not required to be settled again. Amounts already paid, set off, or applied were not to be paid again.

To say that the act of 1857, by some occult relation to the act of 1841, "relinquished" a "reserved" fund that had been consumed upon the Cumberland National road, and that as a consequence nearly a half million of money that had been previously paid out in accordance with the compact made with the State, became due and payable to the State, "*is* offensive to intelligence."

(*c*) Nevertheless, and after all, it will appear to anyone conversant with the ways and methods of legislation that the main thing arrived at by the acts of 1855 and 1857 was the percentage on reservation lands.

The concluding clause of section 2 of the act of 1857, and the use of the words, "as in the case of other sales," in both acts, and their application to the Indian lands and, possibly, in section 2, to other reservations, show the careful attention that was given to the reservation lands.

X.

THE STATUTE OF LIMITATIONS.

If it were possible to find any moneys that the State was ever entitled to in the premises and that have not been paid, it is urged that the statute of limitations is a bar to their present payment. All rights to bring suit for them expired long before 1889. This court is respectfully referred to the views of the Court of Claims upon this point, as set forth on page 24 of the record.

XI.

NO QUESTION OF TRUSTS OR OF TRUST FUNDS REMAINS IN THE CASE.

As the questions presented here appear to the counsel permitted to represent the United States, it would be without profit to discuss in this case the rules and principles applicable to trusts and trust funds.

Any trust funds that ever existed in connection with the matters set forth in the record were long since expended and applied in the performance of the trust.

In an official letter addressed to the Commissioner of the General Land Office, bearing date September 25, 1863, Mr. Otto, Assistant Secretary of the Interior, himself a citizen of Indiana, said (see Globe, p. 1488, Part 2, 42d Cong., 3d sess.):

> There is obviously no substantial difference in principle between the direct payment to a State of the fund and the expenditure of it for the purpose stipulated in the compact between the General Gov-

ernment and such State. In either case the lawful appropriation of the fund is a full discharge of the obligations of the General Government, and a satisfaction of the claims of the State for the payment of the money or the due execution of the trust.

A report made from the Committee on the Judiciary of the Senate February 5, 1873, and signed by Senators Frelinghuysen, Edmunds, Conkling, Carpenter, and Wright (*Id.*, p. 1483), says:

> It can hardly be insisted that the United States has not applied the trust fund according to the contract; and after it has applied to this work a sum so largely in excess of the fund, creating a highway which the country knows was, in early days, of great service to the West, and only abandoning the completion of the road from a change of circumstances which rendered the prosecution of the work undesirable to all, one is at a loss to see any just claim these States at this day have to be again paid the money which has been expended by the United States, according to the contract, for their benefit.

The decision of the Court of Claims dismissing the petition affirms conclusions that have borne the tests of time.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

A. X. PARKER,
Assistant Attorney-General.

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